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HEARING

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In the Matter of:

Adjustment of the Rates for
Noncommercial Educational
Broadcasting Compulsory
License

Docket No. 96-6
CARP NCBRA

Library of Congress
James Madison Building
101 Independence Avenue, S.E.
Room LM414
Washington, D.C. 20540

Monday,
March 16, 1998

The above-entitled matter came on for
hearing, pursuant to notice, at 10:00 a.m.

BEFORE:

THE HONORABLE LEWIS HALL GRIFFITH, Chairperson
THE HONORABLE EDWARD DREYFUS
THE HONORABLE JEFFREY S. GULIN

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I-N-D-E-X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
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Alison Smith

By Mr. Kleinberg	1144		1210	
By Mr. Stein		1173		
By Mr. Schaeffer		1214		

Fredric Willms

By Mr. Klein	1220		1426	
By Mr. Rich		1285		
		1371		1427
By Mr. Schaeffer		1409		

E-X-H-I-B-I-T-S

<u>EXHIBIT NO.</u>	<u>DESCRIPTION</u>	<u>MARK</u>	<u>RECD</u>
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PB

16X	BMI Payment Schedule	1189	1204
17X	Joint Proposal of Broadcast Music Inc., the National Religious Broadcasters Music License Committee, and the National Federation of Community Broadcasters		1408

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1 P-R-O-C-E-E-D-I-N-G-S

2 (10:03 a.m.)

3 CHAIRPERSON GRIFFITH: Ladies and
4 gentlemen, good morning. You had a portion of a
5 weekend anyhow.

6 Let the record reflect that the court
7 reporter has been previously sworn and remains under
8 oath.

9 I have indicated that we've received a
10 telephone call that Judge Dreyfus anticipates being 15
11 minutes late at the maximum, and I understand the
12 parties are agreeable to start without him at this
13 point.

14 MR. KLEINBERG: If that's okay with him.

15 CHAIRPERSON GRIFFITH: He doesn't have a
16 choice.

17 All right, Mr. Kleinberg.

18 MR. KLEINBERG: Yes, Your Honor, before I
19 call BMI's first witness, I just wanted to inquire
20 whether the Panel had before it the book with the one
21 volume of BMI's exhibits because we'll be referring to
22 that and they're all in one volume.

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1 So if you've got it --

2 CHAIRPERSON GRIFFITH: This?

3 MR. KLEINBERG: That's it.

4 CHAIRPERSON GRIFFITH: Yes.

5 MR. KLEINBERG: That will make things, I
6 think, easier in terms of the paperwork.

7 With that, I would call Alison Smith as
8 our first witness.

9 Whereupon,

10 ALISON SMITH

11 was called as a witness and, after having been first
12 duly sworn, assumed the witness stand, was examined
13 and testified as follows:

14 DIRECT EXAMINATION

15 BY MR. KLEINBERG:

16 Q Would you please tell the Panel your name?

17 A My name is Alison Smith.

18 Q And are you employed, Ms. Smith?

19 A Yes, I am.

20 Q And by whom are you employed?

21 A I'm employed by BMI.

22 Q And what is your current position?

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1 A I am the vice president of performing
2 rights.

3 Q And could you explain to the Panel what
4 that position entails in terms of your
5 responsibilities?

6 A Yes, I am responsible for assisting in the
7 development of the payment schedule. I administer
8 certain aspects of our quarterly royalty
9 distributions. I sign songwriters and music
10 publishers to BMI.

11 I work in the area of international
12 incoming royalties. And I do a little bit of
13 troubleshooting as it relates to calls that may come
14 in to BMI, questions about statements. And I
15 communicate policy to our offices as well as to BMI
16 affiliated songwriters and music publishers.

17 Q How long have you been with BMI?

18 A Almost 13 years.

19 Q And where do you work physically now in
20 terms of the location?

21 A I'm based out of the New York office.

22 Q And how long have you been in New York?

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1 A A little over ten years.

2 Q And where were you before that?

3 A Nashville.

4 Q Did you work at BMI in Nashville?

5 A I did.

6 Q And give the Panel some indication of what
7 your prior responsibilities or positions have been at
8 BMI before the current one.

9 A Well, I've had, I think, six or seven
10 different positions at BMI prior to my current one,
11 but I started in the Nashville office as a
12 secretary/research assistant looking up songs for
13 people who wanted to use songs in anything from
14 records to TV programs, telling them who to contact to
15 get those rights.

16 Then I moved into the area of what they
17 call writer, publisher relations which is basically
18 working with songwriters on a day to day basis,
19 signing them to BMI, explaining BMI to them.

20 And then, when I moved to New York, I
21 became more involved in the distribution aspects and
22 moved into a new department that was formed called

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1 performing rights which includes the writer, publisher
2 relations division as well as various different
3 distribution aspects.

4 Q As a result of your various jobs at BMI,
5 are you familiar with BMI's practices with respect to
6 distributions in radio and television?

7 A Yes, I am.

8 Q And are you also familiar with BMI's
9 operations with respect to the monitoring of music
10 performances of music in the BMI catalog?

11 A I am.

12 Q And as a result of your various positions,
13 have -- is it fair to say that you've also had the
14 frequent contact with BMI's writers and publishers?

15 A That's very fair to say. I have frequent
16 contact with them.

17 Q Could you tell the Panel what BMI is, Ms.
18 Smith?

19 A Yes, BMI is a music performing rights
20 organization, and we license the users of music,
21 collect license fees from them, and then we distribute
22 those royalties to the songwriters and music

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1 publishers less an administrative fee.

2 Q When was BMI created?

3 A BMI was created in 1939.

4 Q And I know you weren't around in 1939, but
5 could you tell us who formed BMI?

6 A Yes, BMI was formed by a group of
7 broadcasters as an alternative licensing organization
8 to ASCAP at the time.

9 Q And could you briefly describe to the
10 Panel a little history of BMI's growth following its
11 formation in 1939?

12 A Certainly. We have grown tremendously
13 since 1939.

14 When BMI was formed, we had what was
15 called an open door policy. And there were certain
16 barriers to entry into ASCAP at that time, so certain
17 songwriters were not allowed to join ASCAP, and they
18 were, in fact, invited to join BMI.

19 Typical of that would have been rhythm and
20 blues; subsequent to that, rock and roll; blue grass,
21 etc. And we welcomed them in, and the organization
22 grew by leaps and bounds to where it is now.

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1 We are the world's largest performing
2 rights organization currently with over 180,000
3 affiliated songwriters and music publishers.

4 Q And how many musical works are there in
5 the BMI repertory today?

6 A Approximately three million works.

7 Q Could you describe generally the breadth
8 of the repertoire?

9 A Sure. The repertoire spans broad
10 spectrums of music. We represent people in all genre
11 of music. We represent film composers, people that
12 compose music for television, popular songwriters,
13 people who write country music, rock and roll, jazz,
14 classical, rhythm and blues, Latin, folk.

15 Every possible genre of music that you
16 could imagine, we represent. Gospel -- I'm trying not
17 to leave out anyone.

18 Q To whom does BMI license its repertoire?

19 A We license the repertoire to the users of
20 music -- really anyplace where music is publicly
21 performed.

22 Q And aside from public broadcasting, what

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1 other types of users have BMI licenses?

2 A We license commercial television stations
3 and radio stations. We license bars, restaurants,
4 aerobic studios, airlines, background music services,
5 colleges, universities. And there are many more, but
6 that's a group of them.

7 Q Does BMI also license commercial
8 television networks?

9 A Yes, we do.

10 Q Now you mentioned that you've been
11 involved in and understand BMI's distribution
12 practices with respect to royalties to its affiliates.
13 Could you tell the Panel generally how distributions
14 are made by BMI with respect to music performances?

15 A Yes. BMI makes quarterly --

16 CHAIRPERSON GRIFFITH: Let me just ask one
17 question.

18 Are you offering her as an expert, and
19 should there be some voir dire testimony if they
20 desire?

21 MR. KLEINBERG: They are welcome to that.
22 She's certain an expert in the music licensing

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1 business.

2 CHAIRPERSON GRIFFITH: Seems to me we're
3 getting into the facts.

4 Do you wish to have any voir dire
5 examination?

6 MR. STEIN: I have no voir dire at this
7 time.

8 CHAIRPERSON GRIFFITH: All right.

9 JUDGE GULIN: We've not offered it on
10 several witnesses. So if you ever any voir dire, just
11 --

12 CHAIRPERSON GRIFFITH: Please let us know.

13 MR. STEIN: Thank you.

14 CHAIRPERSON GRIFFITH: Okay, go right
15 ahead.

16 BY MR. KLEINBERG:

17 Q I'm sorry, Ms. Smith.

18 A That's okay.

19 Q My question was if you could describe for
20 the Panel how BMI generally distributes the money to
21 its affiliated writers and composers and publishers.

22 A Yes. As I started to say, for domestic

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1 royalties -- that would be royalties collected -- or
2 license fees collected from the users of music in the
3 United States, we make distributions quarterly.

4 That would include commercial television,
5 noncommercial television, commercial radio,
6 noncommercial radio. And, as I suggested, all of the
7 other licensees would fall into that quarterly
8 distribution.

9 Q And could you explain how that -- you
10 determine the amount of the distributions in a general
11 way?

12 A Generally, the amount of the distributions
13 are determined by the income from the available
14 sources, namely the licensees, and then BMI calculates
15 rates. We then, for radio, we get performance
16 information from the radio stations with whom we have
17 licenses.

18 They provide what are called logs to us
19 which list all the performances of individuals songs
20 in a three day period. It is a sample for radio.
21 Then we take that information and match it up against
22 our song title database which contains things like the

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1 names of the songwriters and music publishers that are
2 applicable shares.

3 We apply it against the rate schedule, and
4 a performance royalty ensues.

5 With respect to television, again it is a
6 quarterly distribution. We utilize actual performance
7 information. That would be on the side of the
8 programming. We receive programming information from
9 the TV Data Corporation.

10 They provide us with the actual numbers of
11 performances of the various television programs. We
12 then rely on music cue sheets, which is the typical
13 document supplied to BMI and ASCAP and SESAC with
14 respect to the content of music in an individual
15 television program.

16 And we take that information. We marry
17 the number of performances of the program to the
18 applicable information in the cue sheet, and again a
19 royalty ensues for a songwriter or music publisher.

20 MR. KLEINBERG: Maybe we should just --
21 since I see Judge Dreyfus has just arrived, can --
22 should we perhaps just wait a minute until he --

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1 CHAIRPERSON GRIFFITH: Sure.

2 JUDGE GULIN: Sure, certainly.

3 MR. KLEINBERG: -- comes in?

4 THE WITNESS: Good morning.

5 JUDGE DREYFUS: Good morning.

6 THE WITNESS: Good morning, thank you.
7 How are you?

8 MR. KLEINBERG: Judge Dreyfus, do you have
9 volume -- the exhibit volume for BMI, this one volume,
10 short volume, two exhibits?

11 JUDGE DREYFUS: Sure.

12 MR. KLEINBERG: Okay, great.

13 As you can tell perhaps, we started
14 without you, but I would like, if everyone doesn't
15 mind, just to introduce the witness to you.

16 This is Alison Smith who is a vice
17 president of the performing rights department of BMI,
18 and she's been testifying about the BMI repertoire and
19 some of the distribution practices which, of course,
20 you know from her written testimony.

21 JUDGE DREYFUS: Right, thank you.

22 And I apologize. I do not run the

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1 railroads, but I got here as soon as I could.

2 BY MR. KLEINBERG:

3 Q Now, Ms. Smith, you were just generally
4 describing the basis on which the distributions are
5 done with respect to television licensees.

6 Would that also apply to public television
7 distributions?

8 A Yes, it does.

9 Q And you mentioned in your testimony the
10 use of cue sheets. And what I'd like you to do is to
11 take a look at Exhibit 3 in the BMI binder. And if
12 you could turn to the third page of that exhibit -- to
13 the last page of that exhibit.

14 Could you tell the Panel what this page
15 is?

16 A Yes, this is a music cue sheet for the
17 series Wishbone.

18 Q And for the Panel's benefit, what is the
19 Wishbone series?

20 A The Wishbone series is a children's show
21 that airs on PBS.

22 Q And can you tell us who prepares -- or who

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1 has prepared this music cue sheet from your
2 understanding?

3 A I can't tell you exactly who prepared it,
4 but typically a program producer would prepare a cue
5 sheet. With the case of PBS, it could be actually PBS
6 or it could have been prepared by the producer of the
7 program and then put on the typical PBS format.

8 Q And could you tell us what this is cue
9 sheet for in the Wishbone series?

10 A Yes, it's for episode number 137. The
11 title of the episode is Pantin' at the Opera.

12 Q And can you tell from Exhibit 3 what the
13 length of this episode was?

14 A Thirty minutes.

15 Q And moving on down, could you tell the
16 Panel what the various categories of information are
17 on the document?

18 A Yes; on this document, as is typical with
19 music cue sheets, you have the indication of the title
20 of a work that is used, which would be in the far
21 left-hand corner; the cue sequence is given farthest
22 left; then you have the songwriters and composers; the

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1 music publishers.

2 You have the length of the particular cue
3 or featured work. You have the usage, which would be
4 theme, background feature or logo. You have the
5 performing rights representation. And then you have,
6 in this particular cue sheet, a source type.

7 Q Now, taking a look at the first cue, cue
8 number one, am I correct that the title of this first
9 composition is "What's the Story, Wishbone?"

10 A Yes, that's correct.

11 Q And this is a -- is this a shared work in
12 terms of the writers?

13 A It is; it's a split work between Tim
14 Cissell, who is a BMI writer, and Lynn Adler, who is
15 a member of ASCAP.

16 Q And there is an indication there after Tim
17 Cissell, BMI 70%, and then 30% after Lynn Adler.
18 What's that indicate?

19 A That indicates the performance share
20 applicable to each individual composer, and that would
21 have been decided by Mr. Cissell and Ms. Adler at the
22 time the composition was written.

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1 Q And what's the use of this first entry,
2 "What's the Story, Wishbone?"

3 A It's used as the opening theme to the
4 program.

5 Q And it says the word vocal there. Does
6 that mean there was singing?

7 A Yes.

8 Q And what was the length of this song?

9 A The opening theme had a one minute usage.

10 Q Can you tell from this cue sheet what the
11 total amount of music was in this episode of Wishbone?

12 A Yes, it's been totaled at the bottom.
13 It's 25 minutes, 53 seconds.

14 Q So does that mean that, close to 26
15 minutes out of the 30 minutes, there was music in this
16 episode?

17 A Yes, that's correct.

18 Q In the next category, it says instrumental
19 underscoring in various ques. What's that mean?

20 A That means that there most likely are many
21 ques that make up the 20 minutes and 12 seconds that
22 you see indicated off to the side.

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1 But they have, because of the fact that
2 it's the same composer, in this case Tom Merriman, who
3 is a BMI composer, they have, instead of listing what
4 may be 25, 30, even 50 different ques, they've
5 summarized them into one line.

6 Q And this is typical of the information
7 that you say is contained in cue sheets that BMI
8 obtains from various sources as part of its cue sheet
9 database?

10 A Yes, it is.

11 Q Now you were describing for us before the
12 general distribution activities with respect to
13 television on a domestic basis.

14 Does BMI also distribute money based on
15 foreign performances of its affiliates works?

16 A Yes, we do.

17 Q And generally how does that take place?

18 A Generally, BMI receives royalties for the
19 performances of the music that it licenses overseas on
20 various bases.

21 It could be quarterly from some major
22 societies that have computer systems that are

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1 advanced. It might be semiannually from other
2 societies. It may be annually from smaller societies.

3 But we collect those royalties on behalf
4 of the songwriters -- primarily songwriters because a
5 lot of the United States publishers have what are
6 known as sub-publishers overseas that collect the
7 publisher share of the income.

8 But we receive the money. We take a small
9 administrative fee and pass through those royalties
10 directly to the composers and publishers.

11 Q Now you told us about information that BMI
12 obtains from network -- television network
13 programming.

14 Does BMI also get information with respect
15 to local television station performances, both
16 commercial and noncommercial?

17 A Yes, we do.

18 Q And tell the Panel what that information
19 consists of.

20 A Well, we receive again, from the TV Data
21 Corporation, the performances on the programs
22 themselves. We do supplement on the side of local

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1 commercial television that information with logs that
2 are provided to us.

3 Typically, pursuant to the license
4 agreement, they provide us one week a year as a sample
5 of locally originating programming. So to break out
6 locally originating and then the remainder on local
7 commercial would be syndication.

8 We collect a census of information on the
9 syndicated side. We marry it to the cue sheets again,
10 and the royalty distribution results. On the local
11 TV, locally originating side, we collect the sample of
12 information and we then take that again against cue
13 sheets, if we have them available, and a royalty
14 distribution results.

15 Q And does that system generally apply also
16 to local public television stations?

17 A It does. The TV Data Corporation again
18 provides the same information on the programs
19 themselves; and PBS, for its network programming,
20 provides us with cue sheets as part of the license
21 agreement for the network feeds.

22 And then for the local performances on PBS

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1 affiliated stations, we would attempt to secure cue
2 sheets and oftentimes receive those cue sheets
3 directly from the program producers or the
4 songwriters, the publishers, from many different
5 sources.

6 Q Now you used the term "locally originated
7 programming" when describing local television
8 stations.

9 Could you describe what you mean by local
10 originating programming?

11 A Locally originating programming would be
12 programming that has been developed and produced and
13 placed on the air by the local station as opposed to
14 receiving it from a third party source.

15 Q And a third party source could be
16 something like a program syndicator or distributor?

17 A Yes, it could.

18 Q Or a network if it were --

19 A Certainly.

20 Q -- dealing with a network?

21 I'd like to ask you to direct your
22 attention now to the BMI repertoire. The Panel has

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1 heard some testimony about the ASCAP repertoire
2 before, and I think we'd like to give you the
3 opportunity to give the Panel some information about
4 the BMI repertoire.

5 And I know this is one of your favorite
6 subjects. And why don't you tell the Panel about some
7 of the BMI writers and genres of music that they
8 operate in, and I'll direct your attention to Exhibit
9 8 for starters, which is the Rock and Roll Hall of
10 Fame.

11 And could you tell the Panel about BMI's
12 affiliates and their involvement with the induction
13 into the Rock and Roll Hall of Fame?

14 A Yes.

15 BMI is very proud of the fact that we
16 represent 76% of those artists and songwriters that
17 have been inducted into the Rock and Roll Hall of
18 Fame.

19 It ranges, as you can see from the list,
20 from the Jackson 5, the Bee Gees, the Beatles, Roy
21 Orbison, Booker T and the MG's, Wilson Pickett, Elvis
22 Presley, and the list really goes on and on -- the

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1 Alman Brothers, John Lennon, and -- I mean, I could
2 read these to you, but I think you get the gist of
3 this.

4 Q And how about the Country Music Hall of
5 Fame? And I'd ask you to take a look at Exhibit 9.

6 A Well, we go even higher there. And we
7 have 83% of the inductees into the Country Music Hall
8 of Fame including, but not listed here, and something
9 we are very proud of at BMI, Francis Preston, our
10 president and chief executive officer is also a member
11 of the Country Music Hall of Fame.

12 But on the performer side and the
13 songwriter side, Buck Owens, Ray Price, Roger Miller,
14 Hank Williams, Minnie Pearl, Kittie Wells, Roy Acuff,
15 many of the top, top names in the country music field.

16 Q How about Willie Nelson?

17 A Willie Nelson too. I was with Willie on
18 Saturday night, as a matter of fact.

19 Q Tell us a little bit about BMI's
20 affiliates and the Pioneer Awards for rhythm and
21 blues, Exhibit 10.

22 A Well, BMI represents 90% of the rhythm and

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1 blues foundation award winners from the Spinners, to
2 Bo Didley, to Fats Domino, Benny King who wrote "Stand
3 by Me," Little Richard, Wilson Pickett, Aretha
4 Franklin, Etta James, Ruth Brown.

5 Again, the list is quite extensive and
6 goes on and on. We have a very rich tradition at BMI
7 in rhythm and blues music.

8 Q Tell us a little bit about BMI affiliates
9 in the jazz field, if you would, please; and I direct
10 you to Exhibit 11 in that regard.

11 A Well, we've supplied a list here, but the
12 most notable composers in the jazz field are Charlie
13 Parker, Charlie Mingus, Gato Barbieri, Mose Allison,
14 Keith Jarrett, Dave Brubeck, Dave Gruzing.

15 And again, we have a huge list here, but
16 Lionel Hampton, Herbie Hancock, Milt Jackson,
17 Thelonious Monk, Sonny Rollins, and the rest of them
18 are listed here.

19 Q And Exhibit 12 is a list of those BMI
20 affiliates who have received a Down Beat Jazz Pole
21 awards, is that correct?

22 A It is correct.

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1 Q And of course I know you'd like to go
2 through all of these one by one, but maybe we'll just
3 leave that for the Panel's further reading pleasure.

4 Tell us a little bit about BMI's classical
5 music affiliates. You had said before that, in fact,
6 classical music was one of the areas in which BMI
7 affiliates conduct themselves, so tell us about that.

8 A Yes; on Exhibit 13, there is -- it's
9 titled BMI Composers Most Performed by American
10 Orchestras, and a number of the names listed here are
11 also Pulitzer Prize winners.

12 You have John Adams; again Dave Brubeck;
13 Bill Bocum; Otto Looney; Charles Ives; Gunther
14 Schuller; Richard Strauss, a German composer; Maurice
15 Ravel, a french composer.

16 You'll note, out to the side on this
17 exhibit -- for example, on Maurice Ravel, it says
18 SACEM. That suggests that the original affiliation of
19 this particular composer is with the French
20 organization SACEM.

21 The rights are then granted through to BMI
22 for U.S. representation by that composer.

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1 John Williams, who you all may know of by
2 Star Wars fame, is also a top composer in the
3 orchestral area.

4 Q And I think Exhibit 14 is a list of those
5 BMI Pulitzer Prize winners, is that correct, Ms.
6 Smith?

7 A That's correct.

8 Q We haven't talked about the Grammy's or
9 the Emmies or the Oscars, and I know that's a subject
10 that's close to your heart. And why don't you tell
11 the Panel a little bit about BMI's affiliates and
12 their performances with those various awards.

13 A Well, one thing we're very proud of this
14 year is the fact that BMI represents four out of the
15 five composers nominated for Oscars in the field of
16 composing for film. Those people are Jerry Goldsmith,
17 who has also previously won an Oscar for his music
18 that was composed for The Omen.

19 We have Danny Elfman, who was nominated
20 twice for the films Good Will Hunting and Men in
21 Black. We have David Numan for Anastasia. And the
22 one thing we don't have is James Horner for Titanic,

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1 but we have four out of the five.

2 Q But you have a piece of the Titanic theme
3 song, don't you?

4 A Yes, we do. Will Jennings, a BMI
5 composer, co-wrote the title song from Titanic, "My
6 Heart Will Go On and On."

7 Q And could you give the Panel some
8 indication of some of the prior Oscar winners that are
9 BMI affiliates? I know you mentioned John Williams.
10 There are others, I'm sure, as well?

11 A Yes, John Williams certainly has won many
12 Oscars. We have Alan Menken of Disney fame. We have,
13 more recently, Elton John and Tim Rice for songs that
14 they wrote for The Lion King. And again, there are
15 lists provided in here that will detail further
16 information on our Oscar winners.

17 Q And tell us briefly about the Grammy
18 awards and how BMI has done with respect to the
19 Grammy's. We've done very well each year in the
20 Grammy's. As a matter of fact, this year we had a
21 really good year.

22 We had -- well, I'd say the songwriters

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1 won, but they were represented by BMI: Kenneth "Baby
2 Face" Edmonds, who has been BMI's Songwriter of the
3 Year for seven years in the a row in the popular music
4 field; David Foster; Paula Cole; Sarah McLaughlin, who
5 is a Canadian composer who is represented by BMI in
6 the U.S.

7 Again, that list goes on and on. But in
8 the Grammy years, we've won songs of the year many
9 times. Julie Gold -- you may know a song called "From
10 a Distance" -- she won several years ago. We
11 represent Sting in the United States. They call him
12 "Stang" in Nashville.

13 But we have many, many composers who have
14 been nominated for and won Grammy awards.

15 Q How about Roy Orbison?

16 A Roy Orbison as well. I knew I'd miss one.

17 Q One of my favorites; that's why I asked.

18 I want to turn your attention now to the
19 subject matter of BMI music in public broadcasting
20 programming, and wondered if you could tell the Panel
21 a little bit about how BMI music is being used in
22 programming by public television.

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1 A BMI music is used quite extensively
2 throughout public television. We specifically have
3 noted the use of BMI music in children's programming
4 on PBS because children's programming accounts for
5 close to half of the programming that's available now
6 on PBS.

7 Q And can you tell the Panel whether BMI has
8 experienced any increase in the use of its music on
9 public television particularly with respect to
10 children's programming?

11 A Yes, we have.

12 We've seen an increase over the years of
13 the use of BMI music specifically related to several
14 different programs. But the Barney and Friends Show
15 contains a tremendous amount of BMI music, as does
16 Sesame Street.

17 We signed the estate of Joe Rapozo, who
18 has done -- or did do quite a bit of work at Sesame
19 Street and in other areas of children's programming.

20 We have music in the series Wishbone.
21 These are -- the three that I've just named are in the
22 top five in terms of ratings for PBS, and it goes on

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1 and on from there.

2 Q And has this increase in the BMI share of
3 the music on children's programming at PBS been
4 something that's happened since 1992?

5 A Yes, we've seen an increase since 1992.

6 Q When was Joe Rapozo -- or when did Joe
7 Rapozo become an affiliate with -- his estate with
8 BMI; was that subsequent to 1992?

9 A Yes, it was.

10 Q Now in your written testimony, on page
11 nine, you list various other programs that BMI music
12 appears on PBS in addition to the children's programs
13 you've identified.

14 Could you briefly identify some of those
15 for the Panel, the non-children's programming?

16 A Yes, some of those shows are The American
17 Experience series; Austin City Limits; we've already
18 spoken about Barney; The Charlie Rose Show; Nightly
19 Business Report; NOVA.

20 And the series Rock and Roll, there's an
21 indication in here that 19.3% of the U.S. households
22 actually tuned in to the Rock and Roll series. And we

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1 mentioned earlier about how many of the Rock and Roll
2 Hall of Fame inductees that BMI represents, and they
3 were used throughout this series.

4 Q Now I won't ask you to go through all of
5 the other shows that are listed there, but you do
6 provide them on pages ten and 11 and 12 of your
7 written testimony in which you've described the
8 various PBS shows that have won Emmy awards and
9 Peabody awards which have music from BMI -- the BMI
10 repertoire, is that correct?

11 A Yes, that's correct.

12 Q Lastly, let me ask you just to comment
13 briefly on the use of BMI music on public radio and
14 tell the Panel a little bit about that.

15 A Again, BMI music is used extensively on
16 public radio, although we don't have an extensive
17 study of that. We have found that, because of the
18 formatting of the NPR affiliated stations, there is
19 musical content of some kind in right at 64, 65% of
20 those stations.

21 And we do receive from NPR program guides
22 for their network feeds for performances. We have

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1 noted other performances of syndicated programming
2 that sometimes goes throughout the network of
3 affiliates even though it's not provided by the
4 network.

5 But a show could be syndicated out of a
6 local station. For example, we've mentioned Garrison
7 Keiller Show in here, and it crosses close to 400
8 different stations even though it does not originate
9 as a network feed.

10 And there's BMI music in that.

11 Q Ms. Smith, thank you.

12 MR. KLEINBERG: No further questions.

13 CHAIRPERSON GRIFFITH: Mr. Schaeffer, do
14 you have any questions, sir?

15 MR. SCHAEFFER: I have no questions.

16 CHAIRPERSON GRIFFITH: All right.

17 MR. STEIN: One moment, please.

18 CHAIRPERSON GRIFFITH: Surely.

19 MR. STEIN: Okay.

20 CROSS EXAMINATION

21 BY MR. STEIN:

22 Q Good morning.

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1 A Good morning.

2 Q I'd like to talk with you a little bit
3 about some aspects of what you were testifying to this
4 morning. And I'd like to begin with your statements
5 concerning BMI being formed back in 1939.

6 I think in your testimony, you note that
7 that was done in part to provide competition to ASCAP,
8 correct?

9 A Correct.

10 Q And that BMI is --

11 (Whereupon, a fire evacuation was
12 conducted.)

13 CHAIRPERSON GRIFFITH: Ms. McGivern, would
14 you ask Nina -- let's go off the record.

15 (Whereupon, the foregoing matter went off
16 the record at 10:40 a.m. and went back on
17 the record at 11:00 a.m.)

18 CHAIRPERSON GRIFFITH: Mr. Kleinberg, are
19 you ready, sir?

20 MR. KLEINBERG: I am, yes. Thank you.

21 CHAIRPERSON GRIFFITH: It occurs to me
22 it's time for our morning recess.

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1 (Laughter.)

2 MR. STEIN: Well, now that I have
3 everybody's attention, let me pick up where I left
4 off.

5 CHAIRPERSON GRIFFITH: Okay, Mr. Stein,
6 please.

7 CROSS EXAMINATION (continued)

8 BY MR. STEIN:

9 Q My last question concerned the fact -- a
10 statement in your testimony that ASCAP is BMI's
11 principal competitor, correct?

12 A Correct.

13 Q Okay. Are you aware of any broadcast
14 station of significance which does not obtain licenses
15 from both ASCAP and BMI?

16 A No, I'm not.

17 Q So when you use the word competitor, I
18 take it you don't mean that ASCAP and BMI compete with
19 each other in the sense of trying to convince one
20 radio or television station to take a license from one
21 society versus the other?

22 A No, and I'm not involved in the licensing

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1 side, only the distribution side. So when I use the
2 word competitor, it's to sign writers to either
3 organization.

4 Q So in a sense, it's a virtual certainty
5 that most television and radio broadcasters which use
6 music are going to require a license from both
7 societies, correct?

8 A That's my understanding, yes.

9 Q Okay. And it would be fair to say that,
10 from the standpoint of those broadcasters, they are
11 thus confronted with having to negotiate with both
12 societies to arrive at an overall fee level to cover
13 their uses of music, correct?

14 A Correct.

15 Q Now I also notice in your testimony that
16 you state that BMI's affiliates depend upon BMI to
17 negotiate reasonable fees and terms with the entire
18 spectrum of music users, correct?

19 A Correct.

20 Q Okay. And when you say entire spectrum,
21 I assume that includes PBS and NPR, correct?

22 A Yes.

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1 Q Okay. And in your experience, BMI
2 fulfills that obligation, correct?

3 A Correct.

4 Q Now you were describing in your testimony
5 the process whereby BMI obtains license fees and then
6 distributes those fees to its members, right?

7 A Correct.

8 Q Okay. And those are performance rights
9 fees, correct?

10 A Correct.

11 Q Okay. But, in addition to the performance
12 rights fees which BMI distributes, there are other
13 sources of income for writers and composers, correct?

14 A Correct.

15 Q Okay. Let's focus for the moment on
16 television and film composers. When I refer to
17 writing original -- I'm sorry, excuse me.

18 There are television and film composers
19 who specialize in writing original music for those
20 media, correct?

21 A Correct.

22 Q Okay. And when I talk about writing --

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1 (Fire evaluation comments.)

2 MR. STEIN: I would move to have those
3 comments stricken from the record, Your Honor.

4 (Laughter.)

5 CHAIRPERSON GRIFFITH: So ordered.

6 MR. STEIN: Thank you.

7 BY MR. STEIN:

8 Q We were talking about composers who write
9 original music. And I just want to make sure that we
10 have the same understanding that writing original
11 music refers to a process whereby a composer is hired
12 to write music which doesn't exist for inclusion in a
13 program that's being produced, correct?

14 A Okay.

15 Q Okay, now in those cases, it's true, is it
16 not, that the writer and composer can and, in fact,
17 usually do receive what's sometime are called "up
18 front fees" for writing that original music, correct?

19 A They may and they may not.

20 Q But there are certainly circumstances
21 where they do?

22 A Correct.

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1 Q Okay. And typically, in the industry,
2 they may sign something called a "composer for hire
3 agreement," correct?

4 A Correct.

5 Q Okay. And that will set forth the amount
6 that they're supposed to be paid and the other terms
7 and conditions for their writing this music, correct?

8 A Correct.

9 Q Okay. Let me turn your attention to the
10 Wishbone cue sheet which Mr. Kleinberg referred you to
11 for --

12 MR. STEIN: I'm sorry, that's Exhibit 3,
13 Your Honor.

14 BY MR. STEIN:

15 Q And I believe that was the cue sheet for
16 episode 137, Pantin' at the Opera, the third page in
17 of that exhibit.

18 A Correct.

19 Q Okay. Directing your attention to the
20 last -- or perhaps it's the third to last column on
21 the cue sheet entitled Source Type, do you see that
22 column?

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1 A Yes, I do.

2 Q Okay. And in that column are the words
3 "for each piece of music contained in this program
4 specially composed," correct?

5 A Correct.

6 Q And that refers to the fact that the
7 writer produced or wrote that composition specifically
8 for this program, correct?

9 A That's correct.

10 Q It did not --

11 A I would assume that that's -- what this
12 means. That's what it typically means.

13 Q Okay, and so typically, Mr. Cissell or Mr.
14 Merriman would negotiate a composer for hire agreement
15 for purposes of producing that music, correct?

16 A Again, they may and may not; I don't know
17 what their agreements -- their specific agreements
18 were on this program.

19 Q Is it your experience, with respect to
20 things like children's programming and the composers
21 who write the music for that, that they do negotiate
22 composer for hire agreements with the producer?

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1 A Usually, yes.

2 Q Okay. And you are not, I assume, aware of
3 any compulsory license which forces a writer or a
4 composer to produce original music for any program,
5 are you?

6 A No.

7 Q They're free to decide to do that or not
8 to do that as they please?

9 A Yes.

10 Q Okay. Now --

11 JUDGE DREYFUS: Before you leave that
12 point, Counsel, could we ask the witness if there's
13 something different between specially composed and
14 specially composed for PBS? Is there a difference?
15 I mean, there's a difference in words, but does it
16 mean anything different?

17 THE WITNESS: The specially composed most
18 likely means that they compose the music, Tim Cissell
19 and Lynn Adler, for the production company or the
20 distributor of the programming.

21 The last cue on there is a system cue or
22 what's known in the industry as a logo that would

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1 identify, in this case, probably PBS, and it would
2 have been written for PBS as opposed to for the
3 production company.

4 JUDGE DREYFUS: I see.

5 BY MR. STEIN:

6 Q Before we leave that document, I'd just
7 like to clarify that, with respect to this show, given
8 the information on the cue sheet, all of the music
9 contained in that show was specially composed,
10 correct?

11 A Correct.

12 Q Okay. Let me now move on -- oh, could you
13 clarify what you mean by logo in response to Judge
14 Dreyfus' question?

15 A Yes, a logo is typically an identifier for
16 a production company or a network where you have music
17 behind an identifying piece of visual effect.

18 Q Let me now direct your attention to
19 Exhibits -- let's start with Exhibit 17 of BMI's
20 direct case.

21 Am I correct that you are sponsoring
22 Exhibit 17 through 20 which are articles describing

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1 the music business, is that correct?

2 A That's correct.

3 Q Okay. Could you tell me -- and we can
4 take them in turn -- what the source of these articles
5 are? Maybe we should start with 17 -- Exhibit 17.

6 A I'm not certain, but I believe these came
7 from the Hollywood Reporter.

8 Q Okay.

9 A They do a special issue on composing for
10 film and television. I believe that's where these
11 came from.

12 Q Would that be true for Exhibits 18, 19 and
13 20 as well?

14 A Eighteen definitely because you see the
15 Hollywood Reporter masthead across the top. Steve
16 Dorff's article --

17 Q That's Exhibit 19, yes?

18 A Yes, Exhibit 19 also looks like it's from
19 the Hollywood Reporter special.

20 Q Okay, and Exhibit 20?

21 A The same.

22 Q Now you didn't write these articles,

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1 correct?

2 A No, I did not.

3 Q And you didn't take to independently
4 verify the facts contained in these articles, correct?

5 A No.

6 Q Okay. But I assume you nonetheless
7 believe them to be accurate?

8 A Yes, for the most part.

9 Q Okay, and in that regard, you included
10 them for purposes of providing the Panel with some
11 background on the current business climate with
12 respect to, I think you phrased it, "the process of
13 composing music for films and television," correct?

14 A Correct.

15 Q Okay. So I take it that you agree with
16 the statement at the second page, and I'm now looking
17 at Exhibit 17. That page has a designation -- I'm
18 looking at the top of the page which -- it's the
19 second page of the exhibit, although there's not a
20 page number clearly noted on it.

21 You agree with the statement by Universal
22 Television senior VP of music Derek Platt that

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1 television "music budgets are being cut," is that
2 correct?

3 And I'm referring now to the last full
4 paragraph in the first column. You'll see the
5 quotation from Mr. Platt "so it bothers me that music
6 budgets are being cut," the last sentence in that
7 paragraph.

8 A I'm sorry, I still can't find it.

9 Q The first column.

10 A Oh, I see it, okay.

11 Q The last sentence of the last full
12 paragraph in that column. "So it bothers me that
13 music budgets are being cut."

14 Do you agree that that's an accurate
15 statement?

16 A Yes, I would agree with that.

17 Q Okay. And similarly, appearing in the
18 next column, the last full paragraph on that page, do
19 you agree with the statement that "there is a major
20 trend towards package deals with composers as a
21 function of declining show budgets," correct?

22 A Correct.

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1 Q Okay. And similarly, in the next column,
2 do you agree with the statement that "music budgets
3 have dropped enormously," correct?

4 A I'd say it's different from one program to
5 the next, so I don't know as I necessarily agree with
6 these as global statements. It would be each
7 individual program, some budgets are being cut.
8 Others may have huge budgets.

9 Q Let me direct your attention perhaps to
10 the next page, the first column. I take it you agree
11 with the statement that "creative" -- now I'm looking
12 at the first full sentence on that page -- "creative
13 fees for TV scores haven't risen in the past decade,"
14 correct?

15 A Again, this is on the next page, on page
16 15?

17 Q Yes, that's correct. I'm looking at the
18 first full sentence.

19 A I'm not that familiar with the creative
20 fees in terms of whether they haven't risen at all in
21 the past decade. I just don't know.

22 Q Okay, let's leave that for the moment.

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1 Isn't it true that PBS and NPR often
2 provide an outlet for music or types of programming
3 which don't necessarily get heard elsewhere?

4 A What do you mean by elsewhere?

5 Q On other broadcast media.

6 A Well, there's children's programming on
7 local television like Fox Kids Network or on cable
8 television overseas there's children's programming.
9 There's other types of programming on PBS.

10 Q Let me give you an example.

11 A Okay.

12 Q With respect to public radio, doesn't
13 public radio have a history of airing programming
14 including music programming which might not get air
15 play on commercial radio?

16 A It's hard to tell. I mean, there are
17 commercial stations that have jazz formats, that have
18 classical formats, that have similar formats to the
19 PBS, NPR stations.

20 Q Well, are you familiar, for example, with
21 the fact that NPR runs a program which focuses on
22 Celtic music called Thistle and Shamrock?

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1 A No, I'm not familiar with that program.

2 Q Is it your understanding that Celtic music
3 is the focus of commercial radio?

4 A No, that's not my understanding.

5 Q Okay. Now would you agree perhaps, with
6 respect to Celtic music, that public radio is
7 providing an outlet which might not be available in
8 commercial radio for those composers?

9 A Probably so, yes.

10 Q Okay. Now in that circumstance, it's
11 correct that the composer is getting air play, and
12 hence performing rights income, that he or she would
13 not otherwise receive in the absence of a
14 noncommercial radio outlet for his or her music,
15 correct?

16 A If that music was not broadcast on any
17 other commercial outlet, then the answer to that would
18 be yes.

19 Q Now with respect to BMI music in public
20 television programming, I think you note that
21 children's programming is an important part of public
22 television, correct?

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1 A That's correct.

2 Q Okay, and I think you stated in your
3 direct testimony that almost half of PBS network air
4 time is devoted to children's programming, correct?

5 A Correct; that's what we found, yes.

6 Q Are you aware of any commercial television
7 station which devotes half of its air time to
8 programming for children -- let me rephrase that.

9 Are you aware of any commercial broadcast
10 television station which devotes 42% of its
11 programming to children?

12 A No, I'm not.

13 Q Okay.

14 MR. STEIN: Let me introduce and have
15 marked as -- I'm sorry, let me offer into evidence --
16 I'm sorry, let me offer for identification a document
17 entitled BMI Payment Schedule bearing Bates number
18 BMI533 to be marked as -- I believe it's Exhibit PB
19 17X?

20 CHAIRPERSON GRIFFITH: I think it's 16.

21 It will be marked as PB Exhibit 16X.

22 (Whereupon, the above-mentioned

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1 document was marked as PB
2 Exhibit 16X for
3 identification.)

4 BY MR. STEIN:

5 Q I'll represent to you that this is a
6 document which was produced by BMI's counsel in this
7 case, okay?

8 A Okay.

9 Q Okay. Now you are familiar with this
10 document, Ms. Smith?

11 A Yes, I am.

12 Q Okay, and this document is BMI's current
13 form of payment schedule, is that correct?

14 A It is.

15 Q Okay. Now in terms of programs which are
16 broadcast on television and radio, is it correct that
17 the music in those programs is generally classified as
18 feature, theme and background?

19 A Generally, yes.

20 Q Okay. And am I correct that BMI places
21 different values on feature, theme and background uses
22 of music for purposes of distributing funds to its

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1 affiliates?

2 A Correct.

3 Q Okay. For example, let me again direct
4 your attention to the Wishbone cue sheet of Exhibit 3.
5 Again, this is the third page, Wishbone Pantin' at the
6 Opera.

7 In column two entitled Music Title or
8 Description, there is information which sets forth the
9 type of use, correct?

10 A Correct; and also, further over to the
11 right, there is a usage column.

12 Q Okay. So, for example, in that usage
13 column, the first que, "What's the Story, Wishbone,"
14 is a theme, correct?

15 A Correct.

16 Q Okay, and the second que, in comparison,
17 an instrumental underscore, is background, correct?

18 A This would be various ques summarized; but
19 yes, they are all used as background music or
20 underscore.

21 Q Okay. And in this particular cue sheet,
22 am I correct that there does not appear to be a

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1 feature use of music, at least as described therein?

2 A In this cue sheet, you are correct.

3 Q Okay. But -- okay.

4 All right, directing your attention now
5 back to BMI Payment Schedule, Exhibit 17X, if we flip
6 to the bottom of page one over to page two --

7 CHAIRPERSON GRIFFITH: 16X.

8 MR. STEIN: I'm sorry, 16X. Excuse me.

9 BY MR. STEIN:

10 Q It's correct that page one over to page
11 two sets forth the payment rules followed by BMI with
12 respect to performances on radio?

13 A Correct.

14 Q Okay. And judging from the fact that that
15 page is broken down between feature performances,
16 theme performances and background music performances,
17 I assume it's correct, as an initial matter, that you
18 pay differently for each of those types of music?

19 A Yes, and the rates are stated in there.
20 And for background music, there's not a payment made.

21 Q Okay, let's talk about that for a second.

22 That means that if there's background

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1 music used on radio, the composer of that music does
2 not receive any payment from BMI --

3 A That's correct --

4 Q -- for the use of that music?

5 A -- under this payment schedule.

6 Q Okay. Now at the top of page two, the
7 rules governing payment for feature uses of music on
8 radio are set forth, correct?

9 A I'm sorry, what page?

10 Q Page two, the top, beginning with -- this
11 is a carry over from page one where the title of that
12 column is, I think, listed. But this top of the page,
13 I believe, is referring to payment for feature uses of
14 music on radio, correct?

15 A Correct.

16 Q Okay. Now as I believe is reflected in
17 the two columns directly appearing under the word
18 local, BMI makes a distinction between the value of
19 music appearing on the top 25% of the nation's radio
20 stations versus programs airing on the bottom 75% of
21 the nation's stations, correct?

22 A Correct.

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1 MR. KLEINBERG: I'm going to lodge an
2 objection at this point in time. I sort of let it go
3 on because I wasn't sure how long we were going. But
4 it seems to me this does go beyond the scope of the
5 direct in terms of what the witness had testified
6 before in her direct testimony, and it just strikes me
7 as beyond what reasonably she testified about.

8 It didn't relate to the payment schedule
9 itself other than it was a payment schedule.

10 CHAIRPERSON GRIFFITH: Mr. Stein.

11 MR. STEIN: The witness did testify that
12 she's responsible for the preparation of this document
13 and that she, within her scope of responsibility, is
14 responsible for the dissemination of royalty payments
15 to BMI members. That's included both in her written
16 testimony and her direct testimony.

17 Further, at page nine of her testimony,
18 she notes that PBS has made extensive use of either
19 feature, theme or background music written by BMI
20 composers, and I think we're clearly entitled to
21 explore her knowledge with respect to the subject
22 matter.

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1 MR. KLEINBERG: Well, if I might --

2 CHAIRPERSON GRIFFITH: Wait.

3 MR. KLEINBERG: -- react to that just for
4 the record.

5 In merely describing what her area of
6 responsibility has been and her job description, that
7 doesn't mean that that's the subject matter of cross
8 examination. Similarly, reference to the extent of
9 use of feature, theme or background on PBS isn't the
10 same thing about how it gets paid for and what the
11 payment schedule is.

12 So I think it's way beyond what she
13 testified about.

14 CHAIRPERSON GRIFFITH: All right, the
15 objection's overruled.

16 Go ahead.

17 MR. STEIN: Thank you.

18 BY MR. STEIN:

19 Q We were talking about the fact that
20 payments -- there's a distinction between the value of
21 music appearing on the top 25% of the stations versus
22 the bottom 75% of the stations, correct?

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1 A Correct.

2 Q So, for example, if I'm looking at the top
3 of page two, performances of popular songs on local
4 programs aired by the top quarter of the stations get
5 12 cents versus six cents for a popular song on the
6 bottom three-quarters, correct?

7 A Correct.

8 Q Okay. And it's also correct, is it not,
9 that the public radio stations in the United States
10 fall into the bottom three-quarters of the radio
11 universe, correct?

12 A Correct.

13 Q Now directing your attention to payments
14 for theme performances on radio at the -- towards the
15 bottom of that page, it's also correct that radio
16 theme performances are credited at about half the
17 value of a feature performance, correct?

18 A Correct.

19 Q Okay. Let's shift if we can now to BMI's
20 television payment rules which appear on page -- which
21 commence on page three of that document.

22 Now am I correct that a feature

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1 performance of a popular song on local television
2 generates a base payment of \$1.50?

3 A Correct.

4 Q Okay. And in comparison, if you go over
5 to page four which is referring to theme performances,
6 I believe, a theme performance of music on a local
7 television station would generate a base payment of 46
8 cents, correct?

9 A Correct.

10 Q So as with radio, BMI generally values a
11 feature performance in local television more highly
12 than a theme performance, correct?

13 A Correct.

14 Q Okay. And for a background use of music,
15 a station would generate a base payment of 42 cents
16 per minute as reflected again under the heading U.S.
17 Television Background Music, correct?

18 A Correct, it's 42 cents per minute.

19 Q Okay. So for purposes of comparison, if
20 you have the same popular song played on local
21 television for one minute, it would generate a base
22 payment in descending order as follows:

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1 You'd have \$1.50 payment if it was played
2 as a feature, correct?

3 A I'm sorry, can you start over again?

4 Q Sure. Let's assume you have a piece of
5 music and it's played for one minute.

6 A Okay.

7 Q And it's played -- if it's played as a
8 feature, it gets paid \$1.50, correct?

9 A Correct.

10 Q And if it's played as a theme, it gets 46
11 cents, correct?

12 A Correct.

13 Q And if it's played as background, it gets
14 42 cents?

15 A Correct.

16 Q Now I think earlier you had mentioned that
17 distributions in the BMI course of business are made
18 quarterly. Is that right?

19 A That's correct.

20 Q Let me ask you to look at the last -- I'm
21 sorry, page six of this document under the title
22 Public Broadcasting. It says there that payments for

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1 performances on National Public Radio stations and
2 public broadcasting system television station is made
3 annually.

4 Now am I to take that to mean that, with
5 respect to those media, payment is not made quarterly?

6 A No, we do now make payment quarterly for
7 all domestic sources in here. Also, you can note that
8 it says cable distributions are made semiannually.
9 Those are also now made quarterly.

10 Q Okay, thank you.

11 Finally, while we're on this page, let me
12 direct your attention to the discussion concerning
13 bonus payments. Without going into this in too much
14 detail, it's correct, is it not, that performances on
15 public broadcasting entities are not eligible for
16 bonus payment, correct?

17 A The performances themselves, no.

18 Q Okay, thank you.

19 Now you're familiar with the phrase public
20 domain insofar as it relates to U.S. Copyright Law?

21 A Yes.

22 Q Okay. And in the copyright context, a

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1 public domain work is a work which is no longer
2 afforded copyright protection typically because the
3 term of copyright has expired, correct?

4 A Correct.

5 Q Okay. So in the case of a musical
6 composition, for example, once a composition enters
7 the public domain, the composer is no longer entitled
8 to receive a royalty for the performance of that work,
9 correct?

10 MR. KLEINBERG: I'll object to the form of
11 the question. Calls for a legal conclusion beyond the
12 scope of the direct.

13 CHAIRPERSON GRIFFITH: Do you want to
14 respond, Mr. Stein?

15 MR. STEIN: She knows the answer.

16 CHAIRPERSON GRIFFITH: Pardon me?

17 MR. STEIN: I think she understands the
18 question and can answer.

19 CHAIRPERSON GRIFFITH: Well, the objection
20 is that it calls for a legal conclusion.

21 MR. STEIN: I don't --

22 MR. KLEINBERG: And is beyond the scope.

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1 MR. STEIN: I don't think it's beyond the
2 scope. As we've discussed, she's familiar with their
3 practices concerning payment for the distribution of
4 works, --

5 CHAIRPERSON GRIFFITH: All right.

6 MR. STEIN: -- and I think she's also
7 familiar with how they pay with respect to works that
8 are or not in the public domain.

9 CHAIRPERSON GRIFFITH: Can you answer that
10 question?

11 THE WITNESS: With respect to works that
12 are -- well, yes, I think I can answer that question.

13 CHAIRPERSON GRIFFITH: All right, go
14 ahead.

15 THE WITNESS: With respect to works that
16 are in the public domain, if there is a copywritten
17 arrangement of that particular work, we would make a
18 distribution to the arranger of that particular work.

19 BY MR. STEIN:

20 Q Okay, and can you describe what you mean
21 by copyrighted arrangement?

22 A If a composer copyrights an arrangement of

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1 a work that had fallen into the public domain and it
2 was used and broadcast an original arrangement, then
3 we would make a distribution to the arranger in that
4 case.

5 Q Okay, and when you're talking --

6 A And a publisher, excuse me, of the
7 arrangement as well.

8 Q When you're referring to that copyrighted
9 arrangement, you're basically describing a situation
10 where a composer has taken an underlying musical
11 composition and either rewritten the lyrics or
12 modified the arrangement in some fashion, correct?

13 A Some modification to the original work,
14 yes.

15 Q Okay. And typically, the person who is
16 doing that is not the person who wrote the original
17 underlying musical composition, correct?

18 A Typically, yes.

19 Q Okay. How does BMI distribute money for
20 performances of copyrighted arrangements?

21 A We distribute -- are you asking for a rate
22 or are you asking for --

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1 Q How does it compare with respect to
2 payments for a work that's not a copyrighted
3 arrangement?

4 A We typically distribute at a rate of 20%
5 of the otherwise applicable rate. There are some
6 exceptions to that, however.

7 Q Okay. So in the case of a copyrighted
8 arrangement, BMI pays less than it would for an
9 analogous performance of a work that's not in the
10 public domain?

11 A Correct.

12 Q Okay. Let me direct your attention to BMI
13 Exhibit 2. These are cue sheets --

14 JUDGE DREYFUS: Before you go on, you have
15 not offered this into evidence.

16 MR. STEIN: I'm sorry, let me do that. I
17 offer it into evidence. This is the BMI Payment
18 Schedule.

19 CHAIRPERSON GRIFFITH: Any objection?

20 MR. KLEINBERG: No.

21 CHAIRPERSON GRIFFITH: It will be
22 received.

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1 (Whereupon, the above-mentioned
2 document, previously marked as
3 PB Exhibit 16X for
4 identification, was received in
5 evidence.)

6 MR. STEIN: Thank you, Your Honor.

7 BY MR. STEIN:

8 Q BMI Exhibit 2 is a collection of cue
9 sheets for the program Barney and Friends which I
10 think you mentioned earlier, correct?

11 A Correct.

12 Q Okay. Now looking at the first page of
13 this exhibit, and similar to the Wishbone cue sheet we
14 looked at earlier, it's correct that this is a cue
15 sheet for Barney program number 115, "Let's Help
16 Mother Goose?"

17 A Correct.

18 Q Okay. And it sets forth the musical
19 compositions which are used in that program, correct?

20 A Correct.

21 Q Okay. Now -- and similar to the Wishbone
22 cue sheet, it reflects the cue number, the music

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1 title, the music by lyrics and by arrangement, the
2 publisher, the length of the cue, the usage, the
3 performing rights affiliation, correct?

4 A Yes, all that's here.

5 Q Okay. And, for example, in the usage
6 column, if you look at cue number two, you see there
7 an indication that that's a feature use, correct?

8 A Correct.

9 Q So whereas Wishbone had no feature uses of
10 music, this program did have some feature uses of
11 music, correct?

12 A Correct.

13 Q Okay. Now when I look at -- am I correct
14 that, upon examination of the third column of this cue
15 sheet, the designation -- and I think you'll see it in
16 various of the entries -- PD before the name of a work
17 indicates that the underlying musical composition is
18 in the public domain?

19 A Yes, that's typically what that means.

20 Q Okay. So, for example, the Barney theme
21 song is "Yankee Doodle," which is in the public
22 domain?

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1 A The Barney theme song is indicated here as
2 being used as the basis of the theme song to Barney.
3 It may not be the same lyric as you suggested earlier.
4 There may be some difference to "Yankee Doodle" as we
5 all know "Yankee Doodle."

6 Q But the music would be identifiable to
7 somebody familiar with the "Yankee Doodle" tune, and
8 I will not attempt to sing it, as "Yankee Doodle,"
9 correct?

10 A Probably. I haven't watched Barney
11 lately, but --

12 Q Okay. Now I notice that if you look at
13 this cue sheet, several other works -- features four,
14 five, six, seven, eight and nine are also based upon
15 public domain works, correct?

16 A Correct.

17 Q Okay. For example, feature nine is done
18 to the public domain work "This Old Man, He Played
19 One," etc., correct?

20 A Correct.

21 Q Okay. Now similarly --

22 A That does have a new lyric.

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1 Q Similarly, if you go to the next cue sheet
2 which is for Exhibit 122, "A Camping We Will Go," --
3 I'm sorry, episode 122, "A Camping We Will Go," is it
4 correct that virtually all of the feature uses of
5 music in this program are based upon public domain
6 works?

7 A No, I can see number six looks like an
8 original composition by Bob Singleton and Phil Parker,
9 "We Like Rocks." Number ten also is an original
10 composition by Phil Parker featured "S'Mores." The
11 number 11 following to the next page, "Ricky Raccoon."

12 Q Let me rephrase.

13 Would you agree that most of the feature
14 uses of music in this episode were based upon public
15 domain works? And now I'm including cues two, three,
16 four, five, seven, eight, nine, 12, 14 and 15?

17 A Looks like about three-quarters of them
18 are.

19 Q Okay. Isn't it true that Barney tends to
20 include many works from the public domain?

21 A Yes.

22 Q And therefore, consistent with your

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1 earlier testimony, a composer such as Mr. Singleton,
2 who you have identified as a composer for Barney, gets
3 paid for the performance of "This Old Man" or "Yankee
4 Doodle" less than he would receive if the underlying
5 work were his own original composition, correct?

6 A Correct.

7 Q Now I think earlier you mentioned that one
8 of the reasons for BMI's purported increase in share
9 is the fact that Mr. Rapozo's estate, the writer for
10 Sesame Street, became part of the BMI repertory since
11 1992, is that correct?

12 A Yes, that was one of the increases, yes.

13 Q And Mr. Rapozo's estate transferred from
14 ASCAP, isn't that correct?

15 A That's correct.

16 Q Okay. So I take it that since BMI's share
17 has gone up as a result of Mr. Rapozo's estate being
18 transferred to BMI, ASCAP's share must have gone down,
19 correct?

20 A I have not analyzed ASCAP's share.

21 Q Okay. But the underlying Sesame Street
22 episodes are still the same; it's just that the artist

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1 has transferred from one society to the other,
2 correct?

3 A In the case of that series, yes.

4 Q Okay.

5 MR. SCHAEFFER: I object. That doesn't
6 show that ASCAP's share decreased.

7 MR. STEIN: I have no further questions.

8 CHAIRPERSON GRIFFITH: Mr. Schaeffer, what
9 was that again?

10 MR. SCHAEFFER: I object to the fact that
11 there's been a shift. It doesn't mean that ASCAP's
12 overall share --

13 CHAIRPERSON GRIFFITH: Well, she didn't
14 answer. She didn't have any information.

15 MR. SCHAEFFER: Oh, I'm sorry.

16 CHAIRPERSON GRIFFITH: All right, nothing
17 further?

18 MR. STEIN: Nothing further, Your Honor.

19 CHAIRPERSON GRIFFITH: All right, any
20 redirect?

21 MR. KLEINBERG: Just a couple questions,
22 please.

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1 May I take a two minute break to confer
2 with my colleagues, please?

3 CHAIRPERSON GRIFFITH: We can take --

4 THE WITNESS: May I run to the ladies'
5 room?

6 CHAIRPERSON GRIFFITH: Now we're up to
7 seven minutes.

8 (Laughter.)

9 THE WITNESS: I'll be quick.

10 CHAIRPERSON GRIFFITH: Thank you.

11 (Whereupon, the foregoing matter went off
12 the record at 11:37 a.m. and went back on
13 the record at 11:46 a.m.)

14 CHAIRPERSON GRIFFITH: All right,
15 gentlemen.

16 REDIRECT EXAMINATION

17 BY MR. KLEINBERG:

18 Q Ms. Smith, you were asked some questions
19 by Mr. Stein about the various rates that appear on
20 the payment schedule for television and radio
21 performances. Do you recall those questions?

22 A Yes.

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1 Q And you told him that the payment schedule
2 had a certain amount for a feature performance on
3 local television and the like.

4 Do those rates, those amounts, apply to
5 public broadcasting performances?

6 A The local television applies or acts as
7 the starting point for public television.

8 Q Starting point. And where does it go from
9 the starting point?

10 A Way down.

11 Q In other words, you use the local
12 television rate as a starting point and then you take
13 a discount off of that rate in terms of the
14 distributions for public television performances?

15 A Yes, because the amount of money available
16 for the distribution is so low that the rate ends up
17 as anywhere from 10 to 15% recently of the local base
18 rate as stated in the payment schedule.

19 Q So if I understand you, you compare to the
20 local television rate for starting purposes, but then
21 you apply the discount to get to the actual rate that
22 you're able to pay for public television?

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1 A Yes, the starting point for feature,
2 theme, background is the local broadcast rate as it
3 applies to PBS.

4 Q And on page six of the payment schedule,
5 PB Exhibit 16, under the heading Public Broadcasting,
6 there's a statement that says at the end "and the
7 amount of the license fee received from the stations
8 by BMI."

9 Does that mean that the pool of money
10 available for distribution for performances on public
11 TV and public radio is limited to the amount of the
12 license fees received by BMI from those sources?

13 A That's correct.

14 Q You also were asked some questions about
15 Celtic music that apparently Mr. Stein says isn't
16 played on commercial radio, but is on NPR.

17 Do you recall that question?

18 A I do.

19 Q Do you have a view as to whether
20 compensation to the writers of that Celtic performance
21 -- that Celtic music should be particularly lower than
22 what it would be if it was on commercial radio?

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1 A I'm sorry, I'm not sure I understand what
2 you --

3 Q Do you think that the writers of the
4 Celtic music are entitled to be paid for their
5 performances on NPR?

6 A Yes.

7 Q You testified also about some questions --
8 you had some questions asked to you about arrangements
9 of music on Barney, for example.

10 A Correct.

11 Q Do you know whether music based on public
12 domain that's been arranged under a copyrighted
13 arrangement is also performed on commercial
14 broadcasting?

15 A Yes, it is.

16 Q It's not unique to public broadcasting, is
17 it?

18 A No, it is not.

19 Q And you were shown some articles that you
20 had attached to your -- or referred to in your
21 testimony about composing, those various Hollywood
22 Reporter articles?

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1 A Right.

2 Q And you were asked some questions with
3 respect to whether budgets on network shows were going
4 down. Do you recall those questions --

5 A I do.

6 Q -- for music?

7 Do you know whether the music budgets for
8 public broadcasting programs have been going down?

9 A No, I don't know.

10 MR. KLEINBERG: Nothing further. Thank
11 you.

12 CHAIRPERSON GRIFFITH: All right.

13 Anything further?

14 MR. SCHAEFFER: I have a few.

15 CHAIRPERSON GRIFFITH: Okay.

16 MR. SCHAEFFER: First of all, having some
17 loyalty to a beloved first wife who came from
18 Carrickgold in Ireland, I want to rise to the defense
19 of Celtic music and not Celtic (phonetic) music, Mr.
20 Kleinberg.

21 (Laughter.)

22 CROSS EXAMINATION

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1 BY MR. SCHAEFFER:

2 Q But just as a question or two, have you
3 ever heard of the musical pieces in something called
4 Riverdance?

5 A Yes, I have.

6 Q Do you know where that music -- what
7 country that music comes from?

8 A Ireland.

9 Q Much to my disquiet, I hate to go into the
10 BMI rep, but it seems to me you mentioned somebody
11 called -- a group called the Chieftains?

12 A Correct.

13 Q Is that an Irish group?

14 A I'm not sure if the Chieftains are Irish
15 or not.

16 Q Isn't there a -- how about U2; that's
17 Irish?

18 A Yes.

19 Q And what about Sinead O'Connor, that's
20 pretty Irish too?

21 A Sinead is Irish, that is correct.

22 Q I see. And just moving on for a bit, you

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1 were asked a number of questions about -- or a couple
2 of questions anyway about how unique children's
3 television is on public television, is that right?

4 A Correct.

5 Q Are you aware that, on cable television,
6 there are a number of services that provide groups of
7 children's programs everyday of the week, seven days
8 of the week?

9 A Yes, I am.

10 Q For example, is there something called
11 Nickelodeon?

12 A There is.

13 Q Do you know what Nickelodeon concentrates
14 on in the mornings?

15 A Children's programming.

16 Q And is there something called Fox Kids
17 Network?

18 A Yes, I mentioned Fox Kids.

19 Q I think you did. I'm sorry.

20 How about the Family Channel; that has
21 children's programming on the cable in the mornings,
22 doesn't it?

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1 A That's correct.

2 Q And what about the Cartoon Network; that's
3 for children also, isn't it?

4 A It's wall to wall cartoons.

5 MR. STEIN: I'm just going to object.
6 He's leading the witness.

7 MR. SCHAEFFER: I'm on cross examination.
8 It's not my witness.

9 BY MR. SCHAEFFER:

10 Q And how about Kids Warner Brothers; that's
11 a biggie too, isn't it?

12 A Kids Warner Brothers?

13 Q Yes, isn't there a show that Warner
14 Brothers has for kids?

15 A I'm not familiar with that.

16 Q Well, then I'll stop bothering you about
17 that.

18 Incidentally, on Exhibit -- by the way,
19 those shows are all on cable as opposed to network
20 television, but I guess you weren't asked about cable;
21 you were asked about network, right, on cross?

22 A Right, but Fox --

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1 Q Yes.

2 A -- is on local television --

3 Q I see.

4 A -- local broadcast, not on network
5 television.

6 Q Thank you.

7 Exhibit 16X, the BMI Payment Schedule,
8 that really has nothing to do with my client, ASCAP,
9 does it?

10 A No.

11 Q And you don't work the same way as ASCAP
12 in that regard?

13 A No, we don't.

14 Q And finally, with some deference to Mr.
15 Salzman who was really a help in this, doing an
16 arrangement or a variation on something in the public
17 domain doesn't necessarily mean that it's a shabby
18 piece, does it?

19 A Not at all.

20 Q For example, there's something called
21 Variations on a Theme by Paganini, by Rachmaninov.
22 There is Brahms Variations on a Theme by Haydn, and

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1 there is -- thank you, Mr. Salzman -- Stravinsky's
2 Variations on a Theme From Happy Birthday, isn't
3 there?

4 A I believe those are actual --

5 Q You wouldn't say that those three pieces
6 from Stravinsky, Brahms and Rachmaninov are shabby,
7 would you?

8 A I'm not familiar with the pieces, but I
9 would not say that they are shabby given the names
10 that you have just indicated.

11 Q Or necessarily less valuable than other
12 classical pieces?

13 A No.

14 Q Thank you.

15 MR. STEIN: One moment.

16 CHAIRPERSON GRIFFITH: All right.

17 MR. STEIN: No further questions, Your
18 Honor.

19 CHAIRPERSON GRIFFITH: All right.

20 May this witness be excused?

21 MR. KLEINBERG: She may.

22 CHAIRPERSON GRIFFITH: Ms. Smith, you're

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1 free to go. Thank you very much, ma'am.

2 THE WITNESS: Thank you.

3 (The witness was excused.)

4 CHAIRPERSON GRIFFITH: All right, Mr.
5 Kleinberg.

6 MR. KLEINBERG: The next witness is
7 Fredric J. Willms.

8 Whereupon,

9 FREDRIC J. WILLMS

10 was called as a witness and, after having been first
11 duly sworn, assumed the witness stand, was examined
12 and testified as follows:

13 DIRECT EXAMINATION

14 BY MR. KLEINBERG:

15 Q Mr. Willms, would you state your name for
16 the record, please?

17 A Fredric Willms.

18 Q And are you employed, sir?

19 A Yes.

20 Q Where are you employed?

21 A At BMI.

22 Q And what position do you current hold at

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1 BMI?

2 A Senior Vice President of Finance and
3 Administration and Chief Financial Officer.

4 Q And how long have you been at -- employed
5 by BMI?

6 A Since February of 1989.

7 Q And how long have you occupied the current
8 position?

9 A Just a month.

10 Q And what position did you occupy before
11 that?

12 A From October of 1993, I was Senior Vice
13 President of Finance and Operations, small
14 distinction, and Chief Financial Officer.

15 Q Could you describe for the Panel what
16 responsibilities those positions have entailed while
17 you have been at BMI?

18 A Yes.

19 As chief financial officer, I am
20 responsible for the books of BMI. And in the
21 operations post, I was responsible for overseeing
22 information technology that we used to call systems

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1 and data processing in operations, which is really our
2 documentation group that deals with identifying
3 performances and maintaining our cue sheet and title
4 and participant databases.

5 Q And have you had experience in connection
6 with BMI's monitoring of -- or accounting of music
7 performances for purposes of distribution?

8 A Yes.

9 Q And have you had any involvement in BMI's
10 licensing activities with respect to music users?

11 A From the point of view of participating in
12 major negotiations with radio and television, I have
13 had that involvement.

14 Q And by that, you mean personal appearance
15 at negotiation sessions?

16 A That's correct.

17 Q And have you also had involvement with
18 respect to public broadcasting license arrangements?

19 A As a member of senior management, I was
20 involved in the internal discussions prior to
21 negotiations.

22 Q Could you tell the Panel briefly what you

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1 did prior to joining BMI in 1989?

2 A I was with Capital EMI Music for 20 years
3 in a variety of roles, including finance and
4 operations involved with music publishing, magnetic
5 products, retail and music video. And I also was head
6 of the music publishing operation for that company.

7 And my last position was chief financial
8 officer and member of the board of directors.

9 Q And could you tell the Panel what business
10 Capital EMI Music, Inc. was involved in?

11 A It's primarily in the record business,
12 although it's also in the music publishing business
13 and some of these other ancillary businesses.

14 Q And is it correct, Mr. Willms, that you're
15 a member of senior management at BMI?

16 A That's correct.

17 Q Now could you describe for the Panel, Mr.
18 Willms, what BMI's proposed license fee in this
19 proceeding is for the public television and radio
20 stations?

21 A Yes, the fee that's being requested is
22 \$6.895 million dollars broken down into \$5.5 million

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1 for public television and \$1.395 million for NPR.

2 Q And is that license fee per year for the
3 next five years?

4 A That's correct, for the years 1998 and
5 forward.

6 Q And does BMI also have an alternative fee
7 proposal that is part of this proceeding?

8 A Yes.

9 In regard to public television, BMI has
10 calculated its music share as 38.6% and feels that it
11 should receive that percentage of any combined award
12 or negotiated amount for ASCAP, SESAC and BMI.

13 Q And is that a minimum, sir?

14 A Yes.

15 Q And when you say BMI has calculated its
16 music share at 38.6%, what are you referring to -- of
17 what?

18 A That's BMI's share of total identified
19 music for the year 1996.

20 Q And performed by whom?

21 A As a result of the use of BMI repertoire.

22 Q On public broadcasting television

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1 stations?

2 A That's correct.

3 Q And is that -- is the universe all music
4 that appears on public television, including public
5 domain?

6 A Yes, that's correct.

7 Q And would BMI's share of copyrighted music
8 on public television be different from the 38.6 number
9 that you gave?

10 A Yes, it would.

11 If public domain music were five and a
12 half percent, as I think has been stated sometime in
13 these proceedings, BMI's share would be 40.8%.

14 Q Now, the fees that BMI have proposed would
15 cover what?

16 A The approach would be to propose a blanket
17 license, as has heretofore been in effect, and so that
18 public television and radio would be entitled to use
19 the entire BMI repertoire on a blanket license basis.

20 Q And that would include both the network
21 programming supplied by PBS and NPR and PRI, as well
22 as all local programming or syndicated programming

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1 that appears on any of the individual public
2 broadcasting television radio stations?

3 A That's correct.

4 Q Could you explain for the Panel generally
5 how BMI arrived at the fee proposal that you have just
6 described?

7 A The general approach was to take the
8 closest thing that could be compared to public
9 television and that -- and radio, and that was
10 commercial television and radio -- and look at the
11 fees that BMI was receiving in those areas and apply
12 that ratio to the revenues of public television and
13 radio.

14 Q Could you explain for the Panel why you
15 have chosen to look at commercial and noncommercial
16 television? Let's start with television for the first
17 instance.

18 A Because there are so many similarities
19 between public television and commercial television.

20 Q Could you tell us that?

21 A All right. The type of programming
22 similar, the types of programs such as children's or

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1 news or drama or comedy or -- all of the kinds of
2 programming you see on commercial television also
3 appear on public television. The production values
4 are similar. I think PBS has superior production
5 values. And the use of music is similar on public
6 television and commercial television.

7 Q Could you focus on the music use subject
8 you've just talked about and tell us what similarities
9 you find to apply between the use of music on
10 commercial and noncommercial television?

11 A Well, as we have just heard, both
12 commercial and public television use feature, theme,
13 and background music to enhance the programming, and
14 those uses are similar on commercial and public
15 television.

16 Q Are there any other factors that you have
17 looked to in considering the relationship between
18 commercial and noncommercial television, in terms of
19 the fee that you are seeking?

20 A The -- we have looked at the fees on
21 commercial television and the revenues that they apply
22 to, and looked at the revenues on public television,

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1 and used that as a gauge to come up with an
2 approximate fee for public television.

3 Q Have you given any consideration to the
4 appearance of advertising or corporate underwriting on
5 public television as a factor that has pertained to
6 your fee proposal?

7 A Yes. Public television is beginning to
8 look more and more like commercial television from the
9 point of view of corporate sponsorships and
10 advertisements on public television.

11 Q And have you seen any of that yourself in
12 terms of the use of corporate underwriting or
13 advertising by public television?

14 A Yes. My good friend Joe DiMona of BMI
15 staff has made a videotape of the morning of
16 September 18, 1997 on WNET, the PBS station in New
17 York, and I have seen an extract of that tape showing
18 six commercials which look very much like commercials
19 on commercial television.

20 MR. KLEINBERG: We would like to play
21 Exhibit 28 at this time.

22 (Whereupon, the videotape was played.)

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1 MR. DiMONA: Your Honor, I would like the
2 record to reflect that this tape was made while my
3 three-year old son Matthew was watching Sesame Street
4 that morning before nursery school.

5 CHAIRPERSON GRIFFITH: It will so reflect.

6 MR. DiMONA: Also, I have one housekeeping
7 matter off the record. If I could ask the witness to
8 speak a little louder, because this is -- the air
9 conditioning fan over here is --

10 CHAIRPERSON GRIFFITH: Okay.

11 MR. DiMONA: -- kind of blocking out the
12 --

13 THE WITNESS: I will try to do that.

14 MR. DiMONA: Thank you.

15 CHAIRPERSON GRIFFITH: Thank you.

16 BY MR. KLEINBERG:

17 Q Mr. Willms, the tape that we have seen,
18 you understand that was spliced together rather than
19 a --

20 A That's correct.

21 Q -- continued sequence?

22 A That's correct.

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1 Q Now, you testified that in proposing the
2 fees at the levels you have described, you looked to
3 BMI's license agreements with commercial television
4 and radio industries, is that correct?

5 A That's correct.

6 Q I'd like to focus your attention now on
7 commercial television, and tell the Panel what the
8 components are of the commercial television industry
9 that BMI licenses.

10 A Well, BMI licenses network television --
11 that's ABC, CBS, and NBC -- as well as local
12 television. And these two areas together were used
13 for arriving at the total commercial television
14 picture.

15 Q Now, I'd like to focus your attention on
16 the local TV component of the commercial TV side. Are
17 you with me?

18 A Yes.

19 Q And could you describe how BMI has and
20 with whom has BMI negotiated its license agreement on
21 the local television side?

22 A On local television, BMI has negotiated

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1 with the Television Music License Committee.

2 Q And what is the Television Music License
3 Committee?

4 A It's a committee that represents
5 approximately a thousand local television stations.

6 Q And am I correct that in the negotiation
7 process BMI does not sit down -- has not sat down with
8 a thousand separate television stations to negotiate
9 the current license?

10 A That's correct. BMI negotiates with the
11 Television Music License Committee.

12 Q And is the Television Music License
13 Committee represented by counsel in those
14 negotiations?

15 A Yes. It's represented by Weil, Gotshal &
16 Manges.

17 Q And you have participated personally in
18 the most recent negotiations?

19 A Yes, I did.

20 Q Could you tell the Panel whether BMI and
21 the local television industry have a current license
22 agreement in effect?

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1 A Yes, they do.

2 Q And what is the term of that license
3 agreement?

4 A 1995 through March 31 of 1999.

5 Q Okay. When was that license agreement
6 with the local television industry negotiated?

7 A It was concluded in March of 1997.

8 Q Okay. And does this license agreement
9 apply to all of the local television stations that the
10 All Industry Music License Committee represented?

11 A Yes, it does.

12 Q Could you tell the Panel what the current
13 license fees are that BMI expects to receive under
14 that license agreement from the local television
15 industry?

16 A Well, for the period April 1, 1997,
17 through March 31, 1999, BMI expects to receive an
18 amount that has a lower and upper bound. And for the
19 period -- and that lower and upper bound are
20 \$141,750,000, and the upper bound is \$151,750,000.
21 And if you divide that -- if you take the midpoint of
22 that you get around \$146 million. And for the year,

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1 the first year, from April 1, '97, through March of
2 '98, the expected number is \$73 million.

3 Q All right. Let's explore that a little
4 bit more, so the Panel understands that. Do each of
5 the stations pay some portion of that total amount of
6 the license fee -- the \$73 million, for example, that
7 would be applicable for the first year of the license?

8 A Well, there are two components -- two
9 kinds of licenses. One is the blanket license, which
10 is the most common license that BMI has. But within
11 that, there is a program license where the stations
12 pay based on music and revenues of particular
13 programs, and stations can choose either one form or
14 the other. And that is part of the reason why we
15 don't know exactly how much money we'll receive,
16 because of the choices that the stations can make and
17 the length of time it takes to adjust reports from
18 stations who choose the program license.

19 Q Was the license negotiated as a flat
20 dollar amount for the entire local television
21 industry?

22 A As far as the range goes, that's correct.

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1 Q And when you said that there was a range,
2 do you mean that there is a ceiling and a floor below
3 which the license fees in total cannot go either
4 downward or upward within the term?

5 A That's correct.

6 Q And so we understand it, the \$73 million
7 figure that you used as BMI's expected license fee for
8 1997 is the middle of the range between the ceiling
9 and the floor?

10 A That's correct.

11 Q But you don't actually know that final
12 amount yet, is that --

13 A That's correct.

14 Q Now, you indicated this license was
15 negotiated or completed in 1997, is that right?

16 A That's correct.

17 Q Could you tell the Panel what the state of
18 licensing was with respect to the local television
19 industry prior to this -- well, strike that.

20 Would you characterize this current deal,
21 the five-year deal you have testified about, as the
22 product of an arms length negotiation?

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1 A Yes, I would.

2 Q And could you explain what you mean by
3 that?

4 A Well, it is really the first time in many,
5 many years that there has actually been a
6 free-standing negotiation that wasn't tied in with
7 court proceedings in one form or another.

8 Q Let me ask you, in terms of negotiations,
9 did BMI get everything that it wanted in the
10 negotiations?

11 A No, it didn't.

12 Q Did the All Industry TV Music License
13 Committee get everything that it wanted?

14 A No, it didn't.

15 Q Now, you said this current license, the
16 one that was finalized in March of '97, was the first
17 license agreement in many years that wasn't affected
18 by litigation, is that correct?

19 A That's correct.

20 Q Would you describe for the Panel what
21 litigation you are talking about and when that
22 litigation was in place?

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1 A Well, this would go back to the late '70s
2 when antitrust litigation was commenced against BMI
3 and ASCAP, and that litigation carried on through the
4 early '80s. And --

5 Q Let me interrupt you here just for a
6 second, Mr. Willms. The antitrust litigation you're
7 referring to, did it have a name?

8 A The Buffalo Broadcasting case.

9 Q And who brought that litigation?

10 A The local television stations against both
11 ASCAP and BMI.

12 Q And that litigation started in 1978?

13 A Yes, that's correct.

14 Q Okay. I'm sorry. Continue on. So you
15 have litigation starting in 1978 by the local
16 television industry against BMI and ASCAP for
17 antitrust violations. What happened?

18 A Well, that litigation was concluded in
19 favor of BMI and ASCAP. And then, the next thing that
20 happened is that the local television industry
21 launched a Rate Court proceeding and an ASCAP Rate
22 Court, which carried on until 1993 and 1994.

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1 Q Let's go back to the license arrangements
2 between BMI and the local television stations at the
3 time that the Buffalo Broadcasting antitrust case was
4 started. Was there or had there been in existence a
5 prior license agreement between the parties?

6 A Prior to 1978?

7 Q Yes.

8 A Yes. And in those agreements, BMI had
9 accepted a rate tied to the ASCAP license. The ASCAP
10 license was based on a percentage of revenue, and
11 BMI's rate was contractually set at 58 percent of the
12 ASCAP rate.

13 Q So whatever ASCAP got as a percentage of
14 revenue from the local television stations, BMI, under
15 this pre-'78 agreement, got 58 percent of that amount?

16 A That's correct.

17 Q What happened with that license
18 arrangement during the course of the Buffalo
19 Broadcasting antitrust suit?

20 A Well, because of BMI's increasing music
21 share, an interim agreement was entered into whereby
22 BMI would receive 68 percent of the ASCAP fee, to be

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1 finally determined after the dust settled, you might
2 say, at 70 percent.

3 Q And that agreement was entered into in
4 1985, is that correct?

5 A Yes, that's correct.

6 Q And prior to 1985, what was BMI getting
7 during the litigation? An interim fee as well?

8 A That's correct.

9 Q Okay. So you've told us now that the
10 antitrust litigation successfully concludes in favor
11 of BMI and ASCAP. And approximately when was that?

12 A In the sort of '83 era.

13 Q And then there is a Rate Court proceeding
14 that the local television industry has with ASCAP,
15 correct?

16 A That's right.

17 Q Was BMI a part of that Rate Court
18 proceeding?

19 A No, it wasn't a part of that proceeding.
20 And at that time, BMI did not have its own Rate Court.

21 Q What was happening with BMI's license fees
22 while the ASCAP rate proceeding was going on between

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1 the local television industry and ASCAP?

2 A It was getting 68 percent of the interim
3 fee that ASCAP was getting.

4 Q And was there any arrangement with respect
5 to what BMI would get of any final fee that might be
6 agreed to by ASCAP?

7 A Yes, that rate was set at 70 percent.

8 Q And what happened next in terms of when
9 any final fee was ever reached?

10 A Well, in 1993, there was a decision in the
11 ASCAP Rate Court and then a subsequent settlement
12 between the TV Music License Committee and ASCAP,
13 which settled everything through 1994. And as a
14 result of that settlement, the TV Music License
15 Committee met with BMI to also settle all fees through
16 December of 1994, and this negotiation was concluded
17 in early 1995.

18 Q So I understand you, BMI was on the
19 sidelines while the ASCAP Rate Court proceedings were
20 unfolding, in terms of what the ASCAP local television
21 arrangements were going to be?

22 A That's correct.

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1 Q And had interim agreements with the local
2 television industry during that whole time period?

3 A That's correct.

4 Q Now, let's focus your attention if you
5 would for the moment on network television. You
6 described BMI had licensing or has licensing
7 agreements with three television networks, is that
8 correct?

9 A That's correct.

10 Q And what is the -- strike that.

11 When did the network license agreements
12 last get negotiated?

13 A Well, there was a final agreement which
14 expired in December of 1996. For some years there had
15 been interim agreements with the television networks
16 as well, and for the three or four years prior to 1996
17 a final arrangement was made with the television
18 networks.

19 Q And you refer in your written testimony to
20 the fact that ABC and NBC and CBS agreements with BMI
21 expired at the end of 1996, is that correct?

22 A That's correct.

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1 Q And you said in your testimony also I
2 believe that as of the date of your testimony, which
3 was September of 1997, negotiations were then underway
4 with respect to the television networks for new
5 license agreements?

6 A That's correct.

7 Q Mr. Salzman reminds me there is a question
8 I should ask you, so I will do that. With respect to
9 the local television license arrangements, were the
10 local television stations seeking a reduction or an
11 increase in fees in the ASCAP Rate Court?

12 A A reduction.

13 Q Going back to the networks, you said as of
14 September the negotiations were ongoing with respect
15 to new deals with the networks, is that correct?

16 A That's right.

17 Q And has that situation changed since that
18 time?

19 A Yes. There have been agreements reached
20 with two of the three networks.

21 Q And that would be for the term starting
22 when?

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1 A January 1, 1997.

2 Q What were the amount of license fees that
3 BMI received from the three commercial television
4 networks in 1996?

5 A Approximately \$33 million.

6 Q Would you characterize the agreements with
7 the television networks that terminated in 1996 as
8 arms length transactions?

9 A Yes, I would.

10 Q And using the same standard you said
11 before, does that mean that parties did not get
12 everything they wanted in those negotiations?

13 A That's correct.

14 Q Would the same thing apply to the local
15 television negotiations that you have talked about?

16 A The last local television negotiation
17 would reflect that, yes.

18 Q Now, you also indicated that you, as part
19 of your fee proposal, looked to a comparison of music
20 usage between the commercial and noncommercial
21 television broadcasters, correct?

22 A That's correct.

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1 Q I'm reminded at this point that I need to
2 close the hearing to anyone who is not entitled to
3 hear the rest of this testimony.

4 (Whereupon, the proceedings went
5 immediately into Executive Session.)
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1 BY MR. KLEINBERG:

2 Q Mr. Willms, I wanted to direct your
3 attention to the fee proposal for public radio, and I
4 believe you testified at the start of your appearance
5 that BMI was seeking a fee of \$1,395,000 per year for
6 the five-year license term for public radio, is that
7 correct?

8 A That's correct.

9 Q And could you explain to the Panel how BMI
10 arrived at that fee proposal for public radio?

11 A Well, the approach was to look at the
12 nearest analog to public radio -- NPR -- which we took
13 to be commercial radio. And we looked at the ratio of
14 BMI's license fee to the total radio revenues in order
15 to apply that ratio to the public -- to the NPR
16 revenues.

17 Q Could you tell the Panel what BMI's
18 blanket license rate for commercial radio stations was
19 in 1996?

20 A Approximately \$115 million.

21 Q Was that the rate or the fees?

22 A I'm sorry. That was the fees. The rate

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1 was 1.605 percent of adjusted net revenues.

2 Q And how did this rate compare actually to
3 ASCAP's rate for a commercial radio station for that
4 time?

5 A The ASCAP fee was 1.615, so the rates were
6 very similar.

7 Q And would you describe for the Panel how
8 BMI has negotiated with respect to the commercial
9 radio industry in terms of license arrangements?

10 A The negotiations took place with the Radio
11 Music License Committee, which is also represented by
12 the firm of Weil, Gotshal & Manges. And these were
13 arms length negotiations which led to voluntary
14 agreements between the industry and BMI.

15 Q How many commercial radio stations are
16 subject to the BMI radio licensing?

17 A Approximately 10,000.

18 Q And so this whole industry -- Radio
19 Committee represented the 10,000 stations in the
20 negotiations of BMI?

21 A The majority of the 10,000.

22 Q What did you do in terms of coming up with

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1 the proposed fee for radio after you looked at the
2 1.605 license -- percent of revenue license rate for
3 commercial radio?

4 A Well, if we just applied that rate --
5 1.605 -- to the NPR revenues of \$457 million, I
6 believe, for 1995, you would get over \$7 million as
7 the -- as a starting point for a fee that BMI might
8 consider requesting. However, since the 1.605 for
9 commercial radio is based on net adjusted revenues, we
10 need to look at another measure in order to try to
11 relate that to National Public Radio.

12 So one way to do this is to take the total
13 revenues of commercial radio and the amount of the
14 actual fees BMI obtained in the -- the year we picked
15 was 1996 for the fees, because that was sort of the
16 year in which we reached the 1.605 level, taking that
17 over 1995 commercial radio revenues, total revenues of
18 over \$11 billion, which is an estimate in itself. And
19 that led to a one percent rate. If you divide one by
20 the other, you get about one percent.

21 So if you applied that to the NPR revenues
22 of \$457 million for 1995, you would get about \$4-

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1 1/2 million.

2 Q Now, in your testimony on page 25, you
3 actually have the figure that you used for
4 noncommercial radio revenues of \$457,191,000?

5 A That's correct.

6 Q And that is all of the noncommercial
7 radio, not just NPR, correct?

8 A Yes.

9 Q And that figure was obtained from the
10 Corporation for Public Broadcasting reports, or the
11 like?

12 A Yes.

13 Q Okay. Continue. So you wound up -- if
14 you apply one percent to the \$457 million, you would
15 wind up with a license fee, then, of?

16 A \$4-1/2 million.

17 Q What did you do next, then?

18 A Well, BMI has, with the help of Dr. Owen,
19 looked at the breakdown of the programming on NPR.
20 And the first 36 percent of the broadcast hours for
21 NPR are in news talk formats. And even though there
22 is BMI music, there is music and there is -- of

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1 course, BMI has a share of that music in these
2 formats. Very little feature music is used, and so
3 BMI has discounted this 36 percent of the programming.

4 Q And when you say discounted, what does
5 that mean? You took a 36 percent discount off of the
6 license fee that you had calculated to act as if there
7 was no BMI music in any part of that broadcasting day
8 that comprised the 36 percent?

9 A That is exactly right.

10 Q Okay. What did you do next?

11 A Dr. Owen again looked at the broadcast
12 hours for classical music, and that turned out to be
13 about 33 percent of the programming and even, again,
14 so there is a lot of public domain music. There is a
15 lot that isn't public domain. And BMI certainly has
16 a share of that. I think you've heard a prior witness
17 testify as to the classical music strength of BMI.
18 So, nevertheless, BMI has decided to discount that
19 part of the programming day.

20 Q So, again, you took off 31 percent from
21 the adjusted license fee to treat that part of the
22 broadcast as if there were no BMI music at all?

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1 A Excuse me. 33 percent.

2 Q 33 percent. All right.

3 A So that gets us down to 31 percent
4 remaining.

5 Q And what is that --

6 A And that is -- that is used for music by
7 NPR in a variety of formats, including pop music and
8 jazz and folk, and so forth.

9 Q And when you mentioned that there was, in
10 fact, BMI music in the news talk format portion of the
11 public radio day, are you also aware that there is
12 news talk formats on commercial radio stations?

13 A That's correct.

14 Q And, similarly, are there classical
15 formats on commercial radio stations?

16 A Yes, there are.

17 MR. KLEINBERG: I'm at a -- not a breaking
18 point -- an appropriate point to take a break, because
19 I am going into a new subject matter. So I can
20 continue on, if you'd like, or we could take a lunch
21 break, if that were appropriate.

22 CHAIRPERSON GRIFFITH: Okay. Well, you

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1 have been on page 26 of the direct testimony. There
2 are only three pages left, but you are not going to --

3 MR. KLEINBERG: Right. I can go on, if
4 you would like. I just --

5 CHAIRPERSON GRIFFITH: I guess the
6 question is, how long would you go on? Just
7 anticipate.

8 MR. KLEINBERG: Ten minutes probably, 15
9 minutes maybe.

10 CHAIRPERSON GRIFFITH: Want to do it?
11 What is your pleasure? All in favor, say aye.

12 (Laughter.)

13 JUDGE DREYFUS: Ten minutes?

14 MR. KLEINBERG: Wrap it up.

15 JUDGE DREYFUS: Okay.

16 CHAIRPERSON GRIFFITH: Yes. Let's try to
17 finish it, if you can.

18 MR. KLEINBERG: I will do my best.

19 CHAIRPERSON GRIFFITH: Good.

20 BY MR. KLEINBERG:

21 Q Mr. Willms, BMI, prior this proceeding,
22 had a license agreement with public broadcasting,

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1 correct?

2 A Could I just -- I sort of feel like I
3 didn't have a chance to deliver the punchline here.
4 I just wanted to say the way we got to the
5 \$1.395 million is to take the percentage of the 31
6 percent. So we really took 31 percent of \$4.5 million
7 to get to \$1.395 million. That was the piece of the
8 programming that had music and so -- so we are using
9 the commercial analog on that piece. So sorry for --

10 JUDGE GULIN: And just to be clear, the
11 \$4.5 million is one percent of the \$457 million?

12 THE WITNESS: That's correct.

13 JUDGE GULIN: And the \$457 million, that
14 includes all sources of funding, correct?

15 THE WITNESS: Yes.

16 JUDGE GULIN: Including government grants?

17 THE WITNESS: That's correct.

18 JUDGE GULIN: Everything.

19 BY MR. KLEINBERG:

20 Q And to round this out, the \$1.395 million
21 figure falls within the license fee range that Dr.
22 Owen concluded in his report as well?

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1 A Yes, that's correct.

2 Q The most recent license agreement that BMI
3 had with public broadcasting was for what amount?

4 A \$785,000 a year.

5 Q And that was a total fee for all
6 television and radio performances?

7 A That's correct.

8 Q You are aware in this proceeding that
9 public broadcasting is seeking to use that fee as an
10 appropriate benchmark for determining the rate for the
11 next five years. Do you agree with that, using that
12 prior fee as an appropriate benchmark?

13 A No. I don't agree with that at all.

14 Q Would you explain to the Panel why you do
15 not think the prior \$785,000 fee is an appropriate
16 benchmark for setting the new BMI fee for the next
17 five years?

18 A Because circumstances have changed.

19 Q Explain what you mean.

20 A First of all, BMI's music use has changed,
21 so that it is much higher than before -- the situation
22 that we went into about the television fees in

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1 commercial television not being available to us in
2 final -- as a final fee prior to the last negotiation.
3 In other words, we really didn't know what commercial
4 television fees were going to be. We now know what a
5 marketplace fee arrangement is through arms length
6 negotiations.

7 So we have a basis for comparison on
8 television, so that is another reason that we now have
9 a benchmark against we can -- we can measure. And the
10 nature of public television has changed so that it has
11 become more and more like commercial television,
12 making it more and more measurable against commercial
13 television as a benchmark. And so those are the
14 reasons why the circumstances have changed.

15 Now, there is another piece to the puzzle,
16 too, and that is that in -- when it was time for the
17 negotiations with BMI, ASCAP had already settled.

18 Q What time period are you talking about?

19 A For the 19 -- for the period leading up to
20 this period.

21 Q The last license agreement in 1992?

22 A That's correct. So it -- and since BMI's

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1 music share was a lot lower, BMI did not think it was
2 worth the time and money to challenge the settlement
3 that had already taken place. So BMI, therefore,
4 negotiated this low fee.

5 Q Mr. Willms, have you had occasion to
6 compare in your mind the commercial license fees that
7 BMI is getting from radio and TV with those that are
8 being proposed in this proceeding by public
9 broadcasting?

10 A Yes. If you look at the total fees that
11 we have just mentioned -- for radio \$115 million, and
12 for television \$106 million -- you get \$221 million.
13 If you take \$785 million -- \$785,000, excuse me, or
14 even a four percent increase over that, you get less
15 than four-tenths of one percent as the -- as the
16 amount of that comparison. Whereas, the public
17 television radio revenues are something in the range
18 of 4.4 percent of the revenues of commercial
19 television radio.

20 So, consequently, if you look at those
21 ratios, BMI is getting less than 10 cents on a dollar
22 from public television and radio, as compared to its

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1 fee on commercial television and radio. And this just
2 seems like an awfully low amount with which to reward
3 composers for their efforts.

4 After all, the same composers write for
5 radio -- public radio and television as write for
6 commercial radio and television. So we think that the
7 fees are -- are obviously very low for public
8 television and radio.

9 Q I'm not a real mathematician, Mr. Willms,
10 myself, as you probably know. But if I understand
11 you, what you've just said, that if you compare the
12 percentage of the license fee proposed by PBS for BMI
13 to the commercial license fees that BMI gets for
14 television radio, it would be four-tenths of one
15 percent? The public would constitute four-tenths of
16 one percent of the commercial?

17 A That's correct.

18 Q And that --

19 A Less than four-tenths of one percent.

20 Q Less than --

21 A Okay.

22 Q But less than four-tenths of one percent.

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1 And that if you compared the revenue relationship, the
2 public broadcasting revenues would be 4.3 percent of
3 the commercial revenues?

4 A That's right. So that, in our minds,
5 should be the fee basis. In other words, the fee
6 should be 4.3 percent of the fees we get on commercial
7 television and radio, instead of less than four-tenths
8 of a percent.

9 MR. KLEINBERG: I have no further
10 questions for the witness at this time.

11 CHAIRPERSON GRIFFITH: All right. Thank
12 you.

13 We will take our luncheon recess. I will
14 ask you to return at 2:05, please.

15 (Whereupon, at 1:06 p.m., the proceedings
16 in the foregoing matter went off the
17 record for a lunch break.)

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A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

(2:06 p.m.)

CHAIRPERSON GRIFFITH: Mr. Schaeffer has disappeared.

MR. KLEINBERG: Yes. Just a minute ago.

CHAIRPERSON GRIFFITH: He was here. There he is.

MR. KLEINBERG: I think in our continuing effort to make things more streamlined, we've got some agreements to, I think eliminate Wednesday, is that -- as a hearing day of this week, by moving the witnesses or the witness who was going to be on Wednesday to Thursday and I think if we can start at 9:30 maybe on Thursday, I guess the expectation is tomorrow and then Thursday would be hit for this week until we resume then afterwards, if that's suitable to the witness.

CHAIRPERSON GRIFFITH: The witness on Thursday would be Dr. Boyle?

MR. KLEINBERG: It would be -- there's two short, relatively short BMI witnesses, Michael Bacon, the composer, and Dr. Epstein who testified about this music use study that you've heard about and then Dr.

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1 Boyle.

2 CHAIRPERSON GRIFFITH: Okay.

3 JUDGE GULIN: Would it be -- make sense to
4 do part of it on Wednesday to make sure we get through
5 on Thursday or do you prefer not to? We're going to
6 be here, I assume. We're not going anywhere this one
7 day.

8 MR. SCHAEFFER: Well, I think many of us
9 can go back to New York for the day's business is the
10 reason we're trying to organize this. I think we all
11 feel reasonably confident that we can finish all three
12 on that day and to some extent -- I actually should
13 defer to Mr. Rich because he has the cross examination
14 which may take longer, but I think we all think we can
15 do it. In the worse case, it's not the end of the
16 world and we can call Epstein or Bacon immediately
17 prior to PBS's case, but I think the feeling was that
18 for a number of us it's very hard to be in Washington
19 away from the practice. So if we could get a full day
20 back at the ranch it would be of great help. I think
21 I speak for everybody when I say that.

22 MR. SALZMAN: The proposal was, I think,

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1 originally aired among counsel on the premise that
2 counsel were all reasonably confident that all three
3 could be done on Thursday.

4 CHAIRPERSON GRIFFITH: Thursday.

5 MR. RICH: Given that we have bifurcated
6 cross examination of Dr. Boyle as you're aware in
7 terms of music. I think Thursday should be do-able.

8 JUDGE GULIN: Okay.

9 CHAIRPERSON GRIFFITH: Okay. And the only
10 other question I have is what time do you want to
11 start tomorrow, Tuesday?

12 MR. SCHAEFFER: I vote for the earliest
13 time.

14 MR. KLEINBERG: Whatever the Panel wishes
15 in that regard.

16 CHAIRPERSON GRIFFITH: 9:30?

17 MR. KLEINBERG: Fine.

18 CHAIRPERSON GRIFFITH: We'll start at 9:30
19 on Tuesday. We will not be in regular session on
20 Wednesday, but we would have to start at 10 o'clock on
21 Thursday.

22 MR. SCHAEFFER: By way of two other

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1 housekeeping matters, I should have the Boyle
2 stipulation for Mr. Rich's examination tomorrow and we
3 have been negotiating about the documents of ASCAP and
4 I think we've made some progress although I don't
5 think either side has yet reached a definite meeting
6 of the minds, but I think we're getting there and I
7 hope we can do that before we adjourn on Thursday.

8 CHAIRPERSON GRIFFITH: Okay, so we'll
9 defer that from having -- from being due by the close
10 of business today until the end of --

11 MR. SCHAEFFER: I think by -- I look to
12 Mr. Rich's side, but I think -- we made our position
13 clear. They quite properly said they want to consider
14 some aspects of it, so Thursday we can look forward to
15 that.

16 CHAIRPERSON GRIFFITH: Okay, fine, thank
17 you.

18 JUDGE DREYFUS: Are we sitting Friday?

19 CHAIRPERSON GRIFFITH: No, we're going to
20 do it all on Thursday and be off on Friday.

21 MR. KLEINBERG: That's part of the
22 expectation.

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1 MR. STEIN: Your Honor, just one other
2 minor housekeeping matter, we had promised revised
3 exhibit PB12X, the report which was not clearly
4 legible. We provide you with a replacement copy.

5 CHAIRPERSON GRIFFITH: 12X, okay.

6 MR. STEIN: That's correct.

7 CHAIRPERSON GRIFFITH: All right, thank
8 you, Mr. Stein.

9 Mr. Schaeffer, did you wish to cross
10 examine, sir?

11 MR. SCHAEFFER: I have a couple of
12 questions, but I would suggest that we do -- Mr. Rich
13 is a lot more liable to cover them than I am.

14 CHAIRPERSON GRIFFITH: All right.

15 Mr. Rich?

16 MR. RICH: Thank you.

17 CROSS EXAMINATION

18 BY MR. RICH:

19 Q Thank you. Good afternoon, Mr. Willms

20 A Good afternoon.

21 Q I'd like to start by discussing with you
22 the attributes which you cite in your testimony, the

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1 attributes of BMI's dealings with commercial
2 broadcasters which in your estimation makes them the
3 best benchmark for determining fair and reasonable
4 fees for for the noncommercial broadcasters who are
5 appearing before this Panel, okay?

6 A Okay.

7 Q Now I take it from your testimony that
8 BMI's dealings with the commercial broadcasters have
9 been quoting from pages 11 and 12 of your testimony
10 "the product of arm's length negotiation", yes?

11 A That's correct.

12 Q "Have resulted in prices that both sides
13 accept", correct?

14 A Yes.

15 Q Which negotiations have since at least
16 1994 when BMI itself came subject to its own rate
17 court been "conducted against the backdrop of an
18 impartial dispute resolution mechanism that serves to
19 insure that the parties negotiate reasonable terms and
20 conditions". That's an accurate statement also from
21 your testimony, is it not?

22 A That's correct.

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1 Q And those three attributes form at least
2 partially the backdrop against which you testify that
3 commercial fees are a good benchmark for establishing
4 fees in this proceeding, correct?

5 A That's correct.

6 Q I'd like to examine each of those elements
7 with you briefly, if I may.

8 First, "the product of arm's length
9 negotiation." Have not the BMI, PBS and NPR
10 negotiations over the years also been the product of
11 arm's length negotiation?

12 A The only one I'm familiar with is the last
13 one, since I wasn't with BMI prior to that.

14 Q You have not become familiarized with the
15 negotiation experience pre-existing the 1992
16 negotiations?

17 A Only in a general way.

18 Q What general way is that?

19 A Well, I do believe that they have been
20 arm's length negotiations.

21 Q And likewise, the 1992 negotiations?

22 A Yes.

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1 Q With which you are personally familiar?

2 A Well, I wasn't directly involved, but I
3 was indirectly involved in the lead up to those
4 negotiations.

5 Q As a member of senior management?

6 A That's correct.

7 Q Were you briefed periodically on the
8 status of those negotiations?

9 A That's correct.

10 Q I take it BMI did not get everything it
11 sought in the 1992 negotiations?

12 A No.

13 Q I take it you would also agree that PBS
14 and NPR did not get everything they sought?

15 A I -- my understanding is that they really
16 did get what they sought.

17 Q Do you have an understanding of what the
18 parties' opening positions in those negotiations were?

19 A My recollection is that at least PBS got
20 nearly what it expected to get.

21 Q Nearly what it got. Okay, but you agree
22 these were arm's length negotiations, correct?

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1 A Yes.

2 CHAIRPERSON GRIFFITH: Can you keep your
3 voice up a little bit.

4 THE WITNESS: Sorry, I'll try.

5 BY MR. RICH:

6 Q Am I also correct, Mr. Willms, to the best
7 of your knowledge that essentially the same negotiators
8 have represented BMI in its respective dealings with
9 major noncommercial and commercial broadcasters at any
10 one point in time?

11 A Well, since I've been involved in the
12 television and radio negotiations directly and not
13 directly in the PBS negotiations, then at least from
14 my vantage points they haven't been exactly the same

15 Q Well, for example, has at least until very
16 recently your general counsel, Marvin Berenson, been
17 a key member of the negotiating team?

18 A That's correct.

19 Q He's in this room, is he not?

20 A That's right.

21 Q That's gentleman?

22 A That's right.

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1 Q And to your knowledge, did he participate
2 in the 1992 PBS negotiations?

3 A Yes, he did.

4 Q And to your knowledge at least until very
5 recently was he a team negotiator in relation to
6 commercial broadcasting license agreements?

7 A Yes.

8 Q He's an experienced negotiator, is he not?

9 A He is.

10 Q Very able, yes?

11 A Absolutely.

12 Q Now you mention the fact that Weil,
13 Gotshal and indeed I personally have participated in
14 certain of the prior commercial licensing
15 negotiations, correct?

16 A That's correct.

17 Q Now was your purpose in so stating in your
18 testimony to suggest that PBS and NPR have been less
19 well represented relatively speaking and hence more
20 subject to BMI's bargaining leverage?

21 A Of course not.

22 Q Now let's talk about the second fact you

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1 cite, "resulting in prices that both sides accept".

2 You don't dispute, do you, that in 1978
3 and again in 1982 and again in 1987 and again in 1992
4 the terms of the BMI/PBS/NPR agreements resulted in
5 prices that both sides accepted. You don't dispute
6 that, do you?

7 A No, I don't.

8 Q By definition. Okay, let's look -- and
9 there was no coercion to your knowledge on BMI to
10 accept these at any particular level, was there?

11 A Not that I am aware of.

12 Q None in 1992 when you participated,
13 correct?

14 A That's correct.

15 Q Let's look at the third factor you cite,
16 "negotiations conducted against the backdrop of an
17 impartial dispute resolution mechanism" that insures
18 "that the parties negotiate reasonable terms and
19 conditions". That's your testimony, right, suggesting
20 that that mechanism in the commercial sector gives the
21 results of those negotiations indicia of
22 reasonableness here, correct?

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1 A That's correct.

2 Q Now you don't dispute, do you, sir, to
3 your knowledge that the 1978, 1982, 1987, and 1992
4 negotiation between BMI and the Public Broadcasters
5 took place "against the backdrop of an impartial
6 dispute resolution mechanism", do you? Namely, the
7 CRT and more recently the CARP?

8 A In that regard, they are similar.

9 Q Yes. One, in fact, that insured "that the
10 parties negotiate reasonable terms and conditions"
11 again from your testimony, correct?

12 A That's correct.

13 Q So indeed is it not a fact that prior to
14 1994 when BMI became subject to a rate court mechanism
15 similar to that which ASCAP has had in place since
16 1950 the only such mechanism as to BMI, that is, the
17 only impartial tribunal to which you cite was in fact
18 the compulsory license mechanism under 118?

19 A That's correct.

20 Q That BMI in its dealings prior to 1994
21 with commercial broadcasters, in fact, was free to
22 withhold its repertory, was it not?

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1 A You mean BMI was free to withhold?

2 Q Yes.

3 A That's correct.

4 Q So that if BMI and the commercial
5 broadcasters reached loggerheads, it was at least an
6 option available to BMI to refuse to issue licenses,
7 is that correct?

8 A That's correct.

9 Q So that as between commercial and
10 noncommercial broadcasters, at least up until 1994,
11 the only "impartial dispute resolution mechanism"
12 available to insure that the parties negotiated
13 "reasonable terms and conditions" was that one
14 available to the noncommercial as opposed to the
15 commercial broadcasters, correct?

16 A That's correct.

17 Q And is it also not the case, sir, that
18 prior to 1994, BMI refused to offer arbitration as a
19 dispute resolution mechanism to commercial arbitrators
20 with whom they were at loggerheads preferring in BMI's
21 own words to keep "a gun to their heads" in
22 negotiations?

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1 A Could you repeat that, please?

2 Q Yes, is it not a fact, sir, on your time
3 at BMI forward, that in one or more instances of
4 impasse prior to 1994 in BMI's dealings with
5 commercial broadcasters, BMI as it advised the
6 Department of Justice in writing, preferred during
7 that era to "keep a gun to the head" of the
8 broadcasters, meaning, figuratively speaking, meaning
9 that BMI always reserved the right to pull access to
10 its repertory if those negotiations failed. Is that
11 not true?

12 MR. KLEINBERG: I'm going to the question
13 to the extent there seems to be something that's being
14 read. I thin in fairness to the witness he should be
15 shown or told what it is.

16 CHAIRPERSON GRIFFITH: Are you quoting
17 something, Mr. Rich?

18 MR. RICH: I'm quoting a phrase which I
19 have heard with my own ears and which I've seen with
20 my own eyes and am asking the witness if he can concur
21 that that was a practice in a statement made by BMI
22 during his tenure at the company.

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1 JUDGE GULIN: You don't now the source of
2 the quote?

3 MR. RICH: Again, the source of the quote,
4 I don't want to testify here, it was meetings I've
5 attended where these statements have been made. I'm
6 asking him if he has first hand knowledge of this.

7 JUDGE GULIN: there's no document that
8 you're reading from?

9 MR. RICH: Not in front of me, no.

10 MR. KLEINBERG: Oh, I thought there was a
11 reference to a filing with the Department of Justice
12 that I heard some reference to. I thought there was
13 a linkage to that document.

14 MR. RICH: Indeed there was, but I can
15 withdraw that from my question.

16 CHAIRPERSON GRIFFITH: Why don't you do
17 that then?

18 BY MR. RICH:

19 Q Let me rephrase. Are you familiar from
20 the time you began involvement in negotiations with
21 commercial and/or noncommercial broadcasters with
22 BMI's stated intent that is at least as articulated to

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1 one or more groups of commercial broadcasters with
2 whom it has dealt, that in the event negotiations
3 failed, rather than put the matter to arbitration, BMI
4 would elect to withhold its repertory?

5 A No, I'm not personally familiar with that.

6 Q Okay. Incidentally, in 1992 was it your
7 understanding that BMI dealt with scattered individual
8 stations representing the noncommercial broadcasters
9 or like in commercial television, did it deal on a
10 centralized basis with representatives of NPR and PBS.

11 A On a centralized basis, yes.

12 Q Analogous, in some respects to dealings
13 with the commercial broadcasters committees, correct?

14 a That's correct.

15 Q Now in relation to the BMI rate court
16 mechanism, now we're talking a period from 1994
17 forward, yes, you cite at page 12 of your testimony as
18 "an important feature" the fact that BMI bears the
19 burden in any rate court proceeding of proving the
20 reasonableness of a proposed fee in a rate dispute, is
21 that correct?

22 A That's correct.

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1 Q And you there state that "this also serves
2 to insure a fair outcome in negotiations between BMI
3 and users" correct?

4 A That's correct.

5 Q To your knowledge, do the provisions of
6 Section 118 place a similar burden on BMI?

7 A Technically, I don't know the answer to
8 that question.

9 Q If I suggest to you that the answer is no,
10 just for purposes of my question, then if I'm correct,
11 would it also then be the case that at least as to
12 this element of your testimony, namely, a factor that
13 insures a fair outcome in negotiations, that element
14 would be lacking as to protection for NPR and PBS,
15 namely the lack of such a burden?

16 A Logically, yes.

17 Q And that would operate relatively speaking
18 to the bargaining disadvantage of noncommercial
19 broadcasters in relation to commercial broadcasters,
20 correct?

21 A If that were true.

22 Q If that fact were established. Now I take

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1 it that BMI to date has never had a rate court
2 proceeding with a commercial broadcaster, is that
3 correct?

4 A That's correct.

5 Q Now we've established that prior to 1994
6 there was no such mechanism, yes, and I take it since
7 1984 BMI has at least attempted to reach negotiated
8 resolutions with various commercial broadcasters at
9 the time of license expirations, true?

10 A Did you mean to say 1994?

11 Q 1994, pardon me.

12 A Would you repeat the question.

13 Q Since 1994, I take it, it has been BMI's
14 preference to attempt to reach negotiated resolutions
15 at the point of contract expirations?

16 A Yes, that's correct.

17 Q Okay, let's talk about your relationships
18 with the Radio Music License Committee, so that the
19 record is clear, that Committee, I take it represents
20 the interest of the commercial radio stations across
21 the country in their music license negotiations, is
22 that correct?

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1 A That's correct.

2 Q And BMI periodically engages in
3 negotiations with that committee, is that correct?

4 A That's correct.

5 Q And am I correct that those typically
6 occur in five year cycles?

7 A Because the previous contracts have been
8 five years in length.

9 Q Yes and does not BMI's consent decree to
10 your knowledge limit the length of a BMI contract to
11 a five year term?

12 A Honestly, I can't answer that question.

13 Q Now has that committee, namely the Radio
14 Music License Committee had a history of litigating
15 its disputes with ASCAP? ASCAP, not with you?

16 A To my knowledge, certainly in recent
17 years.

18 Q So as far as you're aware, say taking the
19 last 20 year period, BMI has been aware, has it not,
20 of the rates and the fee structures its chief
21 competitor, namely ASCAP has had with the commercial
22 radio industry, correct?

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1 A Yes, that's correct.

2 Q And BMI, as you testified in response to
3 questioning by Mr. Kleinberg, has reached virtual fee
4 parity with ASCAP in relation to commercial radio, is
5 that correct?

6 A That's correct.

7 Q Now, at page 24 of your testimony,
8 incidentally, you suggest that BMI anticipates
9 receiving more money as a result of what are now
10 on-going negotiations with the Radio Music License
11 Committee, you so state, correct?

12 A That's correct.

13 Q I take it to be no agreement to that
14 effect has been reached?

15 A That's correct.

16 Q Negotiations are simply ongoing?

17 A That's correct.

18 Q So that is speculative as of now on your
19 part?

20 A That's correct.

21 Q Now, I'm correct, am I not, sir, that BMI
22 is here asking for \$1.395 million per year from the

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1 noncommercial radio broadcasters represented in this
2 proceeding?

3 A That's correct.

4 Q That's the component of the total fee
5 request allocated by the methodology you describe to
6 noncommercial radio, correct?

7 A That's correct.

8 Q Am I also correct that the revenues earned
9 by noncommercial radio are about one quarter of the
10 total revenues earned by public broadcasting?

11 A That's what the numbers here show, yes.

12 Q Yes. You indicate at page 24 of your
13 testimony that 1995 revenues for public radio were
14 about \$457 million?

15 A That's correct.

16 Q Off of a base of \$1.9 billion roughly?

17 A Yes.

18 Q Of total revenues, industry-wide?

19 A Yes.

20 Q Now am I also correct, sir, that in the
21 last expired license agreement between public
22 broadcasting and BMI the total fee received by BMI was

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1 \$785,000 a year?

2 A That's correct.

3 Q And is it not correct that that fee
4 covered both noncommercial radio and television
5 combined?

6 A That's correct.

7 Q And that was an annual fee covering each
8 of the years 1993 through 1997?

9 A That's correct.

10 Q Okay, so am I correct that the annual fee
11 that BMI here seeks for radio alone, namely \$1.395
12 million represents a 77 percent increase over the last
13 annual fee of \$785,000 that BMI negotiated covering
14 radio and TV combined?

15 A That sounds like the right arithmetic.

16 Q Assuming my arithmetic is right?

17 A Yes.

18 Q And that is being requested, I take it in
19 circumstances in which radio represents solely one
20 quarter of total broadcasting income, correct?

21 A That's correct.

22 Q And in an environment in which there's

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1 been no uncertainty as to the commercial radio fees
2 payable to either ASCAP or BMI over the past 20 years,
3 correct/

4 A That's correct.

5 Q And you make no claim here, do you, sir,
6 that BMI share of music performed on noncommercial
7 radio as opposed to noncommercial TV has increased
8 over the past five years, do you?

9 A No. We have not made that claim.

10 Q Now BMI is and has been for some time a
11 large business enterprise, true?

12 A It's something that is relative, but it's
13 certainly not a giant corporation.

14 Q I think that as the chief financial
15 officer you might agree that managing and bringing in
16 and distributing what you report as \$421 million in
17 revenues in 1997 is a considerable task, yes?

18 A Yes. But we certainly would be in the
19 middle range of companies in size, not the top range.

20 Q But you consider yourself a sizeable
21 business enterprise, correct?

22 A Well, yes, we do have pride in that, but

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1 in the big scheme of things it's not a giant
2 corporation.

3 Q Approximately how many employees does BMI
4 have?

5 A About 600.

6 Q Spread in how many cities?

7 A Mainly in Nashville and New York. Some in
8 Los Angeles.

9 Q And you have, I take it, extensive
10 relationships overseas as well with corresponding
11 societies over there, is that correct?

12 A Yes.

13 Q Numbering more than how many?

14 A Oh, we have license agreements with 70 or
15 80.

16 Q I also take it, sir, that BMI has
17 fiduciary obligations to the copyright owners you
18 represent in negotiations, correct?

19 A That's correct.

20 Q You take that seriously, don't you?

21 A Certainly.

22 Q Now, is BMI's pricing to your knowledge

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1 legally constrained by what ASCAP charges a given
2 user?

3 A Not as far as I know.

4 Q And I take it that it's not BMI's practice
5 to collude with ASCAP by discussing the license fees
6 it charges, correct?

7 A Certainly not.

8 Q You wouldn't do that?

9 A Certainly not.

10 Q And in competing for new composer
11 affiliates, I take it that BMI doesn't say in words or
12 effect "don't join us because we can never collect
13 more from the user than brand X"?

14 A I don't think so.

15 Q So in other words, BMI must and does make
16 its own pricing decisions, correct?

17 A That's correct.

18 Q And if BMI determines that its repertory
19 is worth more to a given user than ASCAP's, in your
20 experience, is it not the case that BMI will press for
21 the fees which it believes it's entitled to?

22 A I would put it that BMI uses such things

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1 as its music share to negotiate fees with licensees.

2 Q And if, for example, you feel your music
3 share entitles you to more money relative to ASCAP
4 than you have theretofore received, BMI's not share
5 about, so stating in a negotiation, correct?

6 A That's correct.

7 Q And there's much ample precedent including
8 with respect to the local commercial television
9 industry to support that proposition, true?

10 A Yes, that's correct.

11 Q In fact, I believe you testified on your
12 direct examination by Mr. Kleinberg that over periods
13 spanning back certainly into the early to mid-1980s,
14 BMI managed to racket up its relative share, relative
15 to ASCAP with respect to local television broadcasters
16 from a beginning point of 58 percent of ASCAP fees
17 through fees at or about 70 percent of ASCAP fees to
18 an even higher estimated percentage today, is that
19 correct?

20 A That's correct.

21 Q And that was, I take it, because BMI
22 believed, looking at the data, that its share of music

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1 used by the local television broadcasters had
2 increased relative to ASCAP overcome, correct?

3 A That's correct.

4 Q And BMI vigorously expressed that point of
5 view at the bargaining table, correct?

6 A Yes, it did.

7 Q And pressed to reach a result which would
8 reflect equity from BMI's standpoint in terms of its
9 relationships to ASCAP, correct?

10 A Well, in terms of its relationship to its
11 music share, yes.

12 Q And I take it that being dealt with
13 competitively fairly, that is, in relation to what
14 ASCAP received from a given user is a central tenet of
15 BMI's operations/

16 A It's an important factor.

17 Q And sometimes a critical factor in terms
18 of BMI deciding to close a deal or not with a given
19 user, correct?

20 A All I can say is it's an important factor.

21 Q Okay.

22 A In negotiations.

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1 Q To your knowledge, Mr. Willms, during at
2 least your tenure with BMI or any knowledge you may
3 have from what you learned as to negotiations
4 preceding your tenure, has BMI ever used the argument
5 with a licensee with which it has had a long standing
6 relationship that since BMI's share of that user's
7 total music pie had grown from X to Y percent in a
8 prior five year period that BMI was entitled to
9 something in the range of a 700 percent rate increase?

10 A With any other?

11 Q Yes.

12 A Certainly not a radio or television
13 situation.

14 Q Is there any established user with whom
15 BMI has had many years of relationships and many years
16 of licenses that come to mind where BMI based on the
17 claim that BMI's music share had grown over the prior
18 five year period came in and asked for fee increases
19 approximating 700 percent? Can you think of any
20 example sitting here today?

21 A Well, I can think of examples of large fee
22 increases where BMI felt it had been unreasonably paid

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1 before. I don't know if they come to 700 percent, but
2 certainly much larger increases than in radio of
3 television.

4 Q Can you quantify what it is you have in
5 mind?

6 A Well, I just am aware of one where there
7 has been a large fee increase requested and I believe
8 there are negotiations going on perhaps with which you
9 are familiar.

10 Q And if we need to clear the room at any
11 one point for you to testify, perhaps that is where
12 Mr. Kleinberg is going, we do have a mechanism so that
13 anything that's confidential to your competitor, we
14 can get on a confidential record here. And why don't
15 we hold that though because I will be going through
16 other confidential areas. I'd like to come back in a
17 few minutes though and ask you to identify the user
18 and the magnitude of the increase you just testified
19 to, okay? So please hold that.

20 Let's turn for a few minutes to your
21 dealings with the -- let me just ask you this. You
22 testified to an alternative fee which BMI seeks in

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1 this proceeding, is that correct?

2 A That's correct.

3 Q And that is one based on irrespective of
4 the absolute dollars the percentage of the total pie
5 which BMI believes it is entitled to, correct?

6 A That's correct.

7 Q And that number, I believe is 38.6 percent
8 of total fees payable to ASCAP, BMI and CSAP, correct?

9 A That's correct.

10 Q And I take it the impetus for that
11 alternative approach is the competitive concern about
12 which we've been speaking a few questions back, is
13 that right?

14 A So that we can competitively pay our
15 writers and publishers, right.

16 Q Now turning to the historic relationships
17 with ABC, CBS, and NBC television networks, BMI has
18 historically negotiated and generally speaking reached
19 terms with the three licensed commercial television
20 networks, true?

21 A Yes.

22 Q And at least for a period of 30 years or

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1 so, those licenses have called for flat annual license
2 fees, is that correct, as opposed to fees stated as a
3 percentage of the revenues earned by the networks?

4 A I don't go back 30 years.

5 Q For as long as you're familiar with such
6 licenses?

7 A Yes.

8 Q And other than the ABC, CBS, ASCAP rate
9 court litigation which occurred in the early 1990s
10 focusing on, as I recall, a three year license period,
11 1991 through 1993 for those entities, over the past 15
12 years what other uncertainties have there been in
13 terms of BMI's ability to reach terms with one or more
14 television networks or otherwise get a sense for where
15 the market price was for those networks?

16 A Well, I'm not directly familiar with what
17 went on before I came to the company, so I can't
18 really give you an opinion on that.

19 I'm not aware of whether or not there were
20 any impediments to reaching an arm's length negotiated
21 settlement.

22 Q Well, sitting here today since for better

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1 or worse you are the designated hitter for BMI, do you
2 have any understanding whether say through the period
3 of the 1980s the ultimate levels of fees payable by
4 the ABC, CBS and NBC television networks were so
5 clouded, so uncertain that BMI had little sense of
6 that market?

7 A I'm not aware of any.

8 JUDGE GULIN: Can I just go back for a
9 moment to Mr. Rich's question to you about what he
10 characterizes as an alternative fee proposal, that
11 38.6 percent. That only applied to television,
12 correct?

13 THE WITNESS: That's correct.

14 JUDGE GULIN: And as I understood you, you
15 didn't really characterize it as an alternative fee
16 proposal, but rather as a minimum fee proposal with
17 respect to television only. Is that correct?

18 THE WITNESS: I think that would be the
19 right way to put it.

20 JUDGE GULIN: Okay, thank you.

21 BY MR. RICH:

22 Q Just so I'm clear, the 38.6 percent

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1 relates only to television. Is there a minimum fee
2 you see comprehending television and radio?

3 A Well, the radio fee we've asked for is
4 \$1.395 million. So there isn't a radio sort of stands
5 on its own in this request. Okay?

6 Q I inferred from your testimony, written
7 testimony at page 28 that you believe a number of
8 BMI's network license fees during the 1980s and 1990s
9 were interim in nature. Is that an accurate
10 interpretation of your testimony?

11 A Well, certainly during the 1990s they were
12 interim.

13 Q What do you mean when you use the word
14 "interim"?

15 A Well, not being finally settled.

16 Q And can you give me an example?

17 A Well, if you have a negotiation in which
18 you agree to an interim fee until certain events take
19 place or until certain events pass or until you
20 further agree to a final fee, then it's interim.

21 Q Can you give me an example of an actual
22 network license agreement with BMI between BMI and

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1 ABC, CBS or NBC television network covering the 1980s
2 or 1990s which were so structure?

3 MR. KLEINBERG: I think I may have to
4 invoke the closed door rule only because the
5 agreements in question may reflect confidentiality
6 provisions that I'm not necessarily aware of.

7 MR. RICH: This actually might be a good
8 moment because I am going to cover some details.

9 CHAIRPERSON GRIFFITH: All right, Ms.
10 McGivern has generally offered to extend herself for
11 a while.

12 (Whereupon, the proceedings went
13 immediately into Executive Session.)
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1 CHAIRPERSON GRIFFITH: Okay.

2 BY MR. RICH:

3 Q I'd like to talk to you a little bit about
4 the similarities you've identified between commercial
5 and noncommercial broadcasting, that portion of your
6 testimony?

7 A Yes.

8 Q You assert at page 8 of your written
9 testimony that noncommercial television programming is
10 "quite similar" to commercial television programming
11 "in all of its essential respects." True?

12 A Yes.

13 Q That's what I want to chat with you about
14 for a bit.

15 I take it that you make that assertion
16 based on the observation that both sets of industries
17 show children's programming, films, popular music and
18 other concerts, dramas, comedies, dramatic serials and
19 news and public affairs, correct, that's page 8 of
20 your testimony?

21 A That's correct.

22 Q And you cite as an example National

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1 Geographic which you observe is broadcast on both
2 commercial and noncommercial television, correct? You
3 need to verbalize your answer.

4 A Yes.

5 Q Now first of all, in drawing this
6 programming comparison, Mr. Willms, did you mean to
7 compare solely broadcast commercial television or
8 broadcast and cable commercial television's
9 programming fare with that of noncommercial
10 broadcasting?

11 A Well, I was thinking --

12 Q What did you have in mind?

13 A Primarily of broadcasting.

14 Q Primarily broadcasting.

15 A But there are probably similarities with
16 cable as well, but I mean I was thinking primarily
17 broadcasting.

18 Q Well, that's why I am asking whether your
19 testimony had at its base the similarity between
20 broadcast commercial and I take it your answer is yes?

21 A Yes.

22 Q Cable was not in your mind as you were

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1 drafting this?

2 A That's correct.

3 Q And did you in crafting this testimony
4 perform any analysis of the mix of programming genres
5 as between commercial and noncommercial broadcast
6 television?

7 A You mean the amount of children's or the
8 amount of drama or the amount of --

9 Q Yes.

10 A No.

11 Q I'm going to show you a chart which
12 appears as part of the direct testimony of one of the
13 witnesses our client will be putting on the stand, Mr.
14 Peter Downey of PBS and at page 21, if Your Honors
15 will -- of that testimony there is a chart showing
16 mixes of program genres on PBS and with the Panel's
17 consent I just want to show that to the witness.

18 CHAIRPERSON GRIFFITH: All right.

19 JUDGE DREYFUS: Should we get it out?

20 MR. RICH: There will probably only be one
21 question on it. You may not need to.

22 BY MR. RICH:

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1 Q Mr. Willms, do you see over in the right
2 hand column of the chart on -- I don't have it in
3 front of me, is it page 21?

4 A Yes.

5 Q A series of percentages reflecting the
6 incidents of different categories of programming that
7 appear on the PBS program feed?

8 A Yes, the right hand column for 1994?

9 Q Yes. Scanning that column as against the
10 genres of programming listed, do you have any
11 knowledge as to the degree to which if we were to plot
12 on a similar chart the programming fare appearing
13 either on commercial broadcast network television or
14 local commercial broadcast television, the degree to
15 which those percentage mixes would line up?

16 A No, I don't.

17 Q You don't believe, do you -- thank you --
18 you don't believe, for example, and understand, do
19 you, that approximately 20 percent or 19 plus percent
20 of local television broadcast time is devoted to news
21 and public affairs, do you?

22 MR. SCHAEFFER: I object, news and public

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1 affairs also meets formats, not hours.

2 CHAIRPERSON GRIFFITH: Mr. Schaeffer, I'm
3 sorry, I didn't understand --

4 MR. SCHAEFFER: Two questions, first of
5 all, I object to the news and public affairs, who's
6 defined what that means and also it's formats, it's
7 not hours.

8 MR. RICH: This chart lists percentage of
9 broadcast hours represented by various program types.

10 MR. SCHAEFFER: It was done by format.

11 MR. RICH: Perhaps I can cure the
12 objection, Your Honor.

13 CHAIRPERSON GRIFFITH: All right.

14 BY MR. RICH:

15 Q Do you have a general concept at least in
16 your own mind of what comprises news and public
17 affairs?

18 A Yes.

19 Q And do you have a sense that approximately
20 1 in 5 hours of commercial local broadcast television
21 is devoted to such programming?

22 A Well, I do know there's a lot of news

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1 programming, but I don't know what the exact
2 percentage is.

3 Q Do you have a sense that close to 30
4 percent of local commercial broadcast time is devoted
5 to children's programming?

6 A I wouldn't think the percentage would be
7 that high.

8 Q And the same on network television, on a
9 7 day a week basis?

10 A Yes, but that would be just a guess, but
11 I don't believe so. I'm not -- I haven't done that
12 analysis.

13 Q Beyond identifying the fact that at some
14 point in a broadcast schedule each of these genres of
15 programming you identify at page 8 exist on both
16 commercial and noncommercial, did you take your
17 analysis of programming comparability any further than
18 that?

19 A No.

20 Q Now you also assert at page 8 of your
21 testimony that public television's "production values"
22 are comparable to those of commercial television,

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1 correct?

2 A And in many respects, superior.

3 Q How did you measure this?

4 A Just in trying to judge audience reaction
5 to both commercial and -- our view of audience
6 reaction to what is shown on public television and
7 commercial television.

8 Q You undertook a study to ascertain
9 audience reaction to both media?

10 A No.

11 Q Then I don't understand your answer.

12 A Well, it's our judgment as a company that
13 the production values are similar, from the point of
14 view of our judgment, as opposed to any studies, is
15 equal or better.

16 Q So this assertion reflects merely BMI's
17 opinion?

18 A That's correct.

19 Q Without aid of any external study?

20 A That's correct.

21 Q Now when at pages 9 and 10 of your
22 testimony you state that public television has become

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1 more "attractive" and "commercial" in quality and
2 appearance, might not some find that an oxymoron,
3 namely more attractive and commercial at the same
4 time?

5 MR. KLEINBERG: I object to the form of
6 the question.

7 MR. RICH: I'll withdraw the question.

8 BY MR. RICH:

9 Q If as you cite Jennifer Lawson of PBS,
10 "public television's aim has been to create an
11 appealing alternative to commercial television" how
12 does it make it more commercial?

13 A Well, if you're doing that in the hopes
14 that you are going to improve your ratings, for
15 example, then you are trying to make it more
16 attractive.

17 You're trying to attract more listeners.

18 Q Do you equate your use of the term
19 commercial with an interest in making your programming
20 as attractive to listeners as you can, consistent with
21 one's mission?

22 A I think you can say that.

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1 Q Now, you were in the room and on the
2 stand, I take it, when a videotape prepared by Mr.
3 DiMona of BMI was prepared, correct?

4 A That's correct.

5 Q Mr. DiMona is an employee of BMI?

6 A Yes.

7 Q And did he prepare this tape at your
8 suggestion?

9 A No.

10 Q How did it come to be prepared?

11 A I think he stated -- I don't know if it
12 was on the record or not that he taped six hours of
13 the New York PBS station last September 17th.

14 Q Did he do this of his own instance and
15 then present it to you to the effect of "gee, maybe we
16 should use this in this rate court" pardon me, in this
17 CARP proceeding?

18 A Well, he suggested that it might be useful
19 to look at it.

20 Q And did he provide you with a number of
21 samples of excerpts of underwriting credits from
22 different stations around the country taken on

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1 different days or solely this one?

2 A Just this one.

3 Q And did he represent to you the degree to
4 which this sample was at all typical of underwriting
5 credits which appear on 350 some odd public television
6 stations around the country?

7 A No, he just taped this one morning and an
8 extract was made to show the Panel.

9 Q Did you make any independent effort to
10 investigate the typicality or representativeness of
11 the six examples which were shown the Panel?

12 A No.

13 Q Sitting here today, do you have any
14 knowledge of the representativeness or typicality of
15 these examples?

16 A No study.

17 Q Are you a regular commercial television
18 watcher?

19 A Yes.

20 Q Have you seen the commercial television
21 counterparts of the Chuckee Cheese and Polaroid,
22 etcetera spots that were shown, as they appeared on

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1 noncommercial television?

2 A I haven't tried to do a comparison.

3 Q Sitting here today, do you have any
4 knowledge as to the degree of their similarity or
5 dissimilarity to what was shown as part of BMI Exhibit
6 28?

7 A No.

8 (Pause.)

9 MR. RICH: Your Honors, I have a ways to
10 go if this might be a convenient --

11 CHAIRPERSON GRIFFITH: I think we better
12 take our afternoon recess. Ten minutes, please.

13 (Whereupon, the proceedings went off the
14 record at 5:31 p.m and resumed at 5:46 p.m.)

15 CHAIRPERSON GRIFFITH: All right, Mr.
16 Rich, are you ready, sir?

17 MR. RICH: Yes, sir. Thank you.

18 CHAIRPERSON GRIFFITH: Please.

19 CROSS EXAMINATION

20 BY MR. RICH:

21 Q Mr. Willms, you claim that the use of BMI
22 music on public television and commercial television

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1 is comparable. Correct?

2 A That is correct.

3 Q Here you are referring to broadcast
4 commercial television. Correct?

5 A That is correct.

6 Q You say that as a "general" matter, that's
7 your testimony at pages 8 and 9, you find
8 comparability in the fact that both commercial and
9 public television use feature, theme, and background
10 music. Correct?

11 A Yes.

12 Q Am I missing something or are there any
13 other categories than those three?

14 A No. Those are the three main things that
15 show up on cue sheets.

16 Q So don't virtually all users of BMI's
17 repertory use at least some feature, theme, and
18 background music?

19 A You are talking about in commercial
20 television?

21 Q I am talking about any significant user of
22 BMI repertory, television, radio, general licensing.

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1 Isn't it a self-evident proposition that most any user
2 of BMI's repertory of any note uses some combination
3 of feature, theme, and background music?

4 A Well I think radio use is quite different
5 from television use. I mean the whole emphasis on why
6 you use background music in relation to an audio
7 visual performance is different from how you use music
8 in an audio performance.

9 Q I am just trying to understand your point
10 at the general level, which is to site as a fact that
11 you find makes the two media comparable, that they
12 both use feature, theme, and background music.

13 A Well music is used in the same way in
14 public television as it is in commercial television.
15 That was the point.

16 Q Am I correct that you made no analysis
17 relatively speaking, of the amount of feature versus
18 theme versus background music used on the one hand by
19 public television and on the other hand by commercial
20 television?

21 A No. We did not make a direct comparison.
22 Except that programs, if I can continue, such as the

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1 ones we have cited that are like National Geographic,
2 are used in both and so they use music in the same way
3 in both.

4 Q What percentage of public television
5 programming, to your knowledge, also appears on
6 commercial television? That is, the same series like
7 a National Geographic?

8 A I don't know what that percentage is.

9 Q Not very high, is it?

10 A I don't think so.

11 Q I talked to you a bit about the music use
12 analysis that you and Dr. Owen put together for this
13 case.

14 A (No response.)

15 MR. KLEINBERG: Bruce, this would be
16 appropriate, if you are going to music use, to --

17 MR. RICH: Would that be the Exhibit 33?

18 MR. KLEINBERG: Yes, yes.

19 MR. RICH: Then I am going to ask that we
20 must go on a confidential record again.

21 (Whereupon, the proceedings went
22 immediately into Executive Session.)

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the matter of: Hearing: Adjustment of the Rates for
 Noncommercial Educational
 Broadcasting Compulsory License,
 Docket No. 96-6 CARP NCBRA

Before: Library of Congress
 Copyright Arbitration Royalty Panel

Date: March 16, 1998

Place: Washington, DC

represents the full and complete proceedings of the
aforementioned matter, as reported and reduced to
typewriting.

A handwritten signature in black ink, appearing to be "Christopher", is written over a horizontal line.